(7)

No. 06-376
Title: John F. Hinck, et ux., Petitioners
v.
United States
Docketed: September 18, 2006
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (05-5099)
Decision Date: May 4, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 28 2006	Petition for a writ of certiorari filed. (Response due October 18, 2006)
Jul 28 2006	Supplemental Appendix of John F. Hinck, et ux. filed.
Oct 11 2006	Order extending time to file response to petition to and including November 17, 2006.
Nov 26 2006	Order further extending time to file response to petition to and including December 15, 2006.
Dec 15 2006	Brief of respondent United States in opposition filed.
Dec 27 2006	DISTRIBUTED for Conference of January 12, 2007.
Jan 12 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Monday, April 23, 2007.
Feb 13 2007	Motion to dispense with printing the joint appendix filed by petitioner John F. Hinck, et ux.
Feb 21 2007	Record received from U.S.C.A. for Federal Circuit. (1 envelope)
Feb 23 2007	Brief of petitioners John F. Hinck and Pamela F. Hinck filed.
Mar 5 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 12 2007	Record received from U.S.Court of Federal Claims. (1 box)
Mar 16 2007	CIRCULATED.
Mar 30 2007	Brief of respondent United States filed. (Distributed)
Apr 13 2007	Reply of petitioner John F. Hinck and Pamela Hinck filed. (Distributed)
Apr 23 2007	Argued. For petitioners: Thomas E. Redding, Houston, Tex. For respondent: Jonathan L. Marcus, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Before 1996, the circuits held that district courts and the Court of Federal Claims had 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction over claims to abate interest under 26 U.S.C. §6404(e)(1), but were barred from exercising that jurisdiction because abatement was discretionary and there was no articulated standard for reviewing denials of those requests. The Tax Court held it had no prepayment jurisdiction over §6404(e)(1) at all and followed the circuit courts' discretionary analysis in the exceptional cases where it had overpayment jurisdiction.

In 1996, Congress amended §6404, giving the Tax Court prepayment jurisdiction to review IRS denials of some taxpayer §6404(e)(1) abatement requests using an abuse of discretion standard.

The IRS now asserts the Tax Court has exclusive jurisdiction over both §6404(e)(1) prepayment and refund cases. In *Beall v. U.S.*, 336 F.3d 419 (5th Cir. 2003), the Fifth Circuit held that the 1996 amendments resolved the lack of a justiciable standard issue that precluded exercise of district court refund jurisdiction and resulted in exclusive but limited Tax Court prepayment jurisdiction and limited concurrent refund jurisdiction. The Federal Circuit acknowledged it created a conflict with the Fifth Circuit. The Federal Circuit's exclusivity holding precludes any judicial review of many claims.

The question presented here is:

> Did the grant of selective, limited jurisdiction in the 1996 amendments give the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, deny all relief for many taxpayers, and repeal by implication the existing 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction of the district courts and the Court of Federal Claims?

PARTIES TO THE PROCEEDINGS BELOW

The following are parties to the proceeding in the matter before the Court of Appeals for the Federal Circuit:

John F. Hinck

Pamela F. Hinck

The United States of America.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS,
STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. Statement of Related Cases 2
2. Summary of the Proceedings 4
3. The Jurisdictional Facts Are Uncontested 7

REASONS TO GRANT THE PETITION 8

1. There is a Direct and Express Conflict Between the Fifth Circuit and the Federal Circuit On the Same Issue 8
   a. The Two Courts Have Approached the Issue from Irreconcilable Positions and the Decision of the Federal Circuit Cannot Be Squared With Jurisdictional Statues or This Court's Precedent 9
   b. The Two Courts Disagree on the Conclusions to be Drawn from Legislative History 13
2. The Federal Circuit's Approach Is not Supported by Clear and Convincing Evidence . 16

3. The Conflict is Not Likely to be Resolved Without this Court's Guidance 17

4. The Conflict Is Over an Important Matter that Demands the Court's Attention .. 19

a. The Federal Circuit's Decision Unhinges the Well-Established, Integrated, and Uniform Jurisdictional Scheme Between the District Courts and the Court of Federal Claims 19

b. The Federal Circuit's Decision Displaces the Keystone of the Carefully Articulated and Complex Jurisdictional Scheme of Tax Laws 20

c. The Federal Circuit's Decision is Contrary to Congressional Intent to Expand Taxpayer Rights and Access to Judicial Review of §6404(e)(1) Claims 24

d. The Federal Circuit's Decision Impermissibly Denies Taxpayer's Due Process 25

CONCLUSION 30

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution, Amendment 1 28
United States Constitution, Amendment 14 ..... 27, 28
United States Constitution, Amendment 5 27
United States Constitution, Amendment 6 27
United States Constitution, Article IV 28

Cases

508 Clinton Street Corp., v. C.I.R.,
89 T.C. 352 (1987) 11-13, 21
Abbott Laboratories v. Gardner,
387 U.S. 136, 87 S.Ct. 1507,
18 L.Ed.2d 681 (1967) 16
Adams v. Carlson,
488 F.2d. 619 (7th Cir. 1973) 28
Admiral Financial Corp. v. U.S.,
378 F.3d 1336 (Fed. Cir. 2004) 18
Am. Pelagic Fishing Co. v. U.S.,
379 F.3d 1363 (Fed. Cir. 2004) 27
Am. Pro. Protective Agency, Inc. v. U.S.,
281 F.3d 1234 (Fed. Cir. 2002) 17
Argabright v. U.S.,
35 F.3d 472 (9th Cir. 1994) 5, 16, 23
Asciutto v. C.I.R.,
64 T.C.M. (CCH) 877 (1992) 13
Atkins v. U.S.,
556 F.2d 1028 (Ct.Cl. 1977) 28
Ballhaus v. I.R.S.,
341 F.Supp.2d 1145 (D.Nev.2005) 17, 18
Banat v. C.I.R.,
79 TCM (CCH) 1941 (2000),
aff'd on other grounds without published opinion
2001-1 USTC ¶50,296 (2nd Cir. 2001) 25
Barton v C.I.R.,
97 T.C. 548 (1991) 22

Bates Mfg. Co. v. U.S.,
303 U.S. 567, 58 S.Ct. 694,
82 L.Ed. 1020 (1938) 12, 20
Bax v. C.I.R.,
13 F.3d 54 (2nd Cir. 1993) 13, 17
Bayou Fleet, Inc. v. Alexander,
234 F.3d 852 (5th Cir. 2000) 28
Beall v. U.S.,
170 F.Supp.2d 709 (E.D. Tex. 2001). 2
Beall v. U.S.,
335 F.Supp.2d 743 (E.D. Tex. 2004) 2
Beall v. U.S.,
336 F.3d 419
(5th Cir. 2003) i-6, 8, 10, 17, 18, 23, 26
Benedict v. Sec. of Dept. of H.H.S.,
29 Fed.Cl. 587 (1993) 28
Bill Johnson's Restaurants v. NLRB,
461 U.S. 731, 103 S.Ct. 2161,
76 L.Ed.2d 277 (1983) 27
Boddie v. Conn.,
401 U.S. 371, 91 S.Ct. 780,
28 L.Ed.2d 113 (1971) 28
Bounds v. Smith,
430 U.S. 817, 97 S.Ct. 1491,
52 L.Ed.2d 72 (1977) 27
Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667, 106 S.Ct. 2133,
90 L.Ed.2d 623 (1986) 16
Brahms v. U.S.,
18 Cl.Ct. 471 (1989) 16
Brewer v. Baugh,
370 F.Supp.2d 988 (D.Ariz.,2005) 17
Brinkerhoff-Faris Trust & Savs. Co. v. Hill,
281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) .. 28
Bullard v. Webster,
623 F.2d 1042 (5th Cir. 1980) 16
Butler v. C.I.R.,

114 T.C. 276 (2000) 23, 24
C.I.R. v. Sunnen,
333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) ... 30
Calif. Motor Transp. v. Trucking Unlimited,
404 U.S. 508, 92 S.Ct. 609,
30 L.Ed.2d 642 (1972) 28
Chambers v. Baltimore & Ohio RR Co.,
207 U.S. 142, 28 S.Ct. 34,
52 L.Ed. 143 (1907) 27, 28
Charlton v. C.I.R.,
114 T.C. 333 (2000) 24
Continental Equities, Inc. v. C.I.R.,
551 F.2d 74 (5th Cir. 1977) 11
Cruzan by Cruzan v. Director, Missouri Dept. of Health,
497 U.S. 261, 110 S.Ct. 2841,
111 L.Ed.2d 224 (1990) 17
Davies v. U.S.,
124 F.Supp.2d 717 (D.Me.2000) 17, 18
DeWitt v.Pail,
366 F.2d 682 (9th Cir. 1966) 28
Dogwood Forest Rest Home, Inc. v. U.S.,
181 F.Supp.2d 554 (M.D.N.C.2001) 17, 18
Dunlop v. Bachowski,
421 U.S. 560, 95 S.Ct. 1851,
44 L.Ed.2d 377 (1975) 16
E. RR Pres. Conf. v. Noerr Motor Freight Inc.,
365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961 .. 28
Edmonds v. Compagnie Generale Transatlantique,
443 U.S. 256, 99 S.Ct. 2753,
61 L.Ed.2d 521 (1979) 14
Estate of Baumgardner v. C.I.R.,
85 T.C. 445 (1985) 11
Ex Parte Hull,
312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) .. 27
Fehlhaber v. Fehlhaber,
681 F.2d 1015 (5th Cir. 1982) 28
Fernandez v. C.I.R.,

114 T.C. 324 (2000) 24
Finley v. U.S.,
612 F.2d 166 (5th Cir.1980) 30
Flora v. U.S.,
362 U.S. 145 (1960) 9, 10, 20, 21, 29
Flores v. U.S.,
51 Fed. Cl. 49 (2001) 24
Gibraltar Fin. Corp. v. U.S.,
825 F.2d 1568 (Fed.Cir.1987) 19
Gorospe v. Commissioner,
___ F.3d ___, 2006 WL 1687398
(9th Cir. June 21, 2006) 22
Heasley v. C.I.R.,
902 F.3d 380 (5th Cir. 1990) 22
Henderson v. U.S.,
95 F.Supp.2d 995 (E.D.Wis.2000) 17
Hinck v. U.S.,
446 F.3d 1307 (Fed. Cir. 2006) 1, 3-6, 17, 26
Hinck v. U.S.,
64 Fed.Cl. 71 (2005) 2
Hirschfield v. U.S.,
2001-2 USTC ¶50,480,
___ F.Supp.2d ___ (E.D.N.Y. 2001) 21
Hirshfield v. U.S,
2001 WL 579783 (S.D.N.Y.,2001) 17
Horton Homes, Inc. v. U.S.,
936 F.2d 548 (11th Cir. 1991) 5, 14, 16, 23
Hudson v. I.R.S.,
2004 W.L. 1006266 (N.D.N.Y.) 17
I.R.S. v. Blais,
612 F.Supp. 700 (D.Mass.1985) 27
In re 1900 M Restaurant Assoc., Inc.,
319 B.R. 302 (Bkrtcy,.D.Dist.Col., 2005) 17
In re Karlsson
247 B.R. 321 (Bkrtcy.M.D.Fla., 2000) 18
In re Mira,
245 Bankr. 788 (Bankr. M.D. Pa. 1999) 23

Johnson v. Avery,
393 U.S. 483, 89 S.Ct. 747,
21 L.Ed.2d 718 (1969) 27
Kapp v. U.S.,
989 F.2d 1202 (Table),
1993 WL 26728 (Fed.Cir. 1993) 5
Kirby Corp. v. Pena,
109 F.3d 258 (5th Cir. 1997) 16
Kraemer v. U.S.,
2002 WL 575791 (S.D.Tex., 2002)
(unpublished) 3, 17, 18
Leiter v. U.S.,
2004 WL 303210 (D.Kan.) 17
Lorillard v. Pons,
434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) .. 14
Marbury v. Madison,
5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) 16
Merrill Lynch, Pierce, Fenner & Smith v. Curran,
456 U.S. 353, 102 S.Ct. 1825,
72 L.Ed.2d 182 (1982) 14
Midlantic Nat'l Bank v. N.J. Dep't Envtl. Prot.,
474 U.S. 494, 106 S.Ct. 755,
88 L.Ed.2d 859 (1986) 14
Oscar Mayer & Co. v. Evans,
441 U.S. 750, 99 S.Ct. 2066,
60 L.Ed.2d 609 (1979) 15
Pennsylvania v. Finley,
481 U.S. 551, 107 S.Ct. 1990,
95 L.Ed.2d 539 (1987) 27
Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495,
108 S.Ct. 1350, 99 L.Ed.2d 582 (1988) 15
Ratzlaf v. U.S.,
510 U.S. 135, 114 S.Ct. 655,
126 L.Ed.2d 615 (1994) 15
Rogers v. Desiderio,
58 F.3d 299 (7th Cir. 1995) 30

Ryland v. Shapiro,
708 F.2d 967 (5th Cir.1983) 28
Selman v. U.S.,
941 F.2d 1060 (10th Cir. 1991) 5, 16, 17, 23
Silver v. Cormier,
529 F.2d 161 (D.C.Colo. 1976) 28
Stiltner v. Rhay,
322 F.2d 314 (9th Cir. 1963) 28
Traynor v. Turnage,
485 U.S. 535, 108 S.Ct. 1372,
99 L.Ed.2d 618 (1988) 15
Turner v. Safley,
482 U.S. 78, 107 S.Ct. 2254,
96 L.Ed.2d 64 (1987) 28
U.S. v. Davenport,
___ F.Supp.2d ___,
2006 WL 1555845 (W.D. OK, June 5, 2006) 17
U.S. v. Ripa,
323 F.3d 73 (2nd Cir. 2003) 17
U.S. v. Shanbaum,
10 F.3d 305 (5th Cir. 1994) 29
Washington Energy Co. v. U.S.,
94 F.3d 1557 (Fed.Cir.1996) 18, 19
Weiner v. U.S.,
213 F.Supp.2d 728 (S.D.Tx., 2002) 3
Weiner v. U.S.,
389 F.3d 152 (2004) 3, 4, 17, 18
White v. C.I.R.,
95 T.C. 209 (1990) 22
Xechem I'natl, Inc. v. Univ. of Texas,
382 F.3d 1324 (Fed. Cir. 2004) 28

Statutes

26 U.S.C. §6015(f) 23
26 U.S.C. §6110(j)(1)(B) 13
26 U.S.C. §6213 10
26 U.S.C. §6330(d)(1)(A) 22

26 U.S.C. §6404(e)(1) . . i, 1, 3-10, 12, 14, 16, 17, 19, 22-29
26 U.S.C. §6404(h) 2, 6, 8, 9, 11, 12, 25-27
26 U.S.C. §6404(h)(2)(B) 10
26 U.S.C. §6512 11
26 U.S.C. §6512(b) 10, 12
26 U.S.C. §6621(c) 22
26 U.S.C. §7422(a) 13
26 U.S.C. §7422(a) 2, 5, 6, 10
26 U.S.C. §7430(c)(4)(A)(ii) 2, 26
26 U.S.C. §7442 . . . . . 2, 6, 11, 12, 19
26 U.S.C. §7481(c) 10, 11
28 U.S.C. §1254(1) 1
28 U.S.C. §1295(a)(3) 7
28 U.S.C. §1346(a)(1) i-3, 5-7, 9-11, 13, 20-22
28 U.S.C. §1491(a)(1) i-7, 9, 11, 13, 22
28 U.S.C. §2412(d)(1)(B) 2
28 U.S.C. §2412(d)(2)(B) 2, 26

Public Law No. 104-168, §301(a),
110 Stat. 1452 (1996)
("Taxpayer Bill of Rights 2") 1

Public Law No. 105-206,
("IRS Restructuring and Reform Act of 1998") 2

Public Law No. 99-514,
100 Stat.2085, §1563
("Tax Reform Act of 1986") 1

Rules

Rules of the Court of Federal Claims Rule 12(b)(1) 7

Miscellaneous

H.R. 4163, never enacted 15
H.R.Rep. No. 104-506 (1996) 13, 25
H.R.Rep. No. 106-566 (2000) 15
LOUIS L. JAFFE, JUDICIAL CONTROL OF
ADMINISTRATIVE ACTION 339-353 (1965) 16

OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Federal Circuit is reported at *Hinck v. U.S.* , 446 F.3d 1307 (Fed. Cir. 2006). App. 1.[1] The conflicting opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Beall v. U.S.* , 336 F.3d 419 (5 th Cir. 2003). App. 18.

JURISDICTION

The judgment of the Federal Circuit was filed on May 4, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the following statutes, regulations, and legislative history at issue are reprinted in the appendix to this petition due to their length:

1. 26 U.S.C. §6404(e)(1),[2] App. 42.

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[1] References to "App. x" are to page "x" of the attached Appendix.

[2] As originally enacted by the Tax Reform Act of 1986, § 1563, Pub.L. No. 99-514, 100 Stat.2085, 2762. Congress amended §6404(e)(1) in 1996 with the Taxpayer Bill of Rights II, which is also known as "TBOR2." P.L. 104-168, § 301(a), 110 Stat. 1452 (1996). App. 62. The amendments made two changes to §6404(e)(1): the word "unreasonable" was added before "error or delay," and the words "ministerial act" were changed to "ministerial or managerial act." Those changes were effective for tax years beginning after July 30, 1996, and do not apply to this case, which concerns tax year 1986. The pre-1996 version of §6404(e)(1) is reproduced in the Appendix.

2. 26 U.S.C. §6404(h),[3] App. 42.
3. 26 U.S.C. §7422(a), App. 48.
4. 26 U.S.C. §7430(c)(4)(A)(ii), App. 49.
5. 26 U.S.C. §7442, App. 50.
6. 28 U.S.C. §1346(a)(1), App. 51.
7. 28 U.S.C. §1491(a)(1), App. 52.
8. 28 U.S.C. §2412(d)(1)(B), App. 54.
9. 28 U.S.C. §2412(d)(2)(B), App. 54.

STATEMENT OF THE CASE

1. Statement of Related Cases

This case and *Beall* arose from disputes over the tax treatment of 43 related limited partnerships that shared a common general partner, AMCOR, a California corporation, and are collectively referred to by the IRS and in this litigation as the "AMCOR partnerships." John Hinck invested as a limited partner in Agri-Cal Venture Associates.[4] Raymond Beall was a limited partner in Ag-Venture Associates and Oasis Date Associates.[5]

These two cases represent a group of almost two

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[3] In the 1996 amendments, §6404(h) was initially designated §6404(g). It was redesignated as §6404(i) by the IRS Restructuring and Reform Act of 1998, Pub L. No. 105-206, and then redesignated as §6404(h) in 2002 by P.L. 107-134, § 112(d)(1). This amendment applies to requests for abatement submitted after July 30, 1996, regardless of the tax year, and thus applies to the Hincks' claim.

[4] Though not at issue, via ACVA he was also an indirect partner in Rancho California Partners II. Pamela F. Hinck is involved here only because the Hincks filed a joint 1986 return.

[5] *Hinck v. U.S.*, 64 Fed.Cl. 71, 72 (2005); *Beall v. U.S.*, 335 F.Supp.2d 743, 745 (E.D. Tex. 2004); see also *Beall v. U.S.*, 170 F.Supp.2d 709 (E.D. Tex. 2001).

hundred cases pending primarily in, and split roughly equally between, the various district courts of the Fifth Circuit and the Court of Federal Claims. Counsel for the Hincks also represents the Bealls and the partners in those two hundred or so other currently pending cases. Counsel represents over one hundred other AMCOR partners who filed §6404(e)(1) refund claims but have not yet filed suit. Those actions will be filed as they become ripe.[6]

The §6404(e)(1)[7] refund claims in these cases all arose out of identical facts regarding ministerial errors or delays in the consolidated IRS examination of the partnerships. All of the claims assert the same legal grounds for relief and rely on the same authorities.

Almost all of these cases also involve claims for refund of tax, interest, and penalty interest on other grounds not at issue here. All of those other cases are stayed pending the outcome of *Beall*, *Hinck*, and other cases that are representative of the other grounds for refund. The Fifth Circuit has addressed some of those other grounds in a consolidated appeal from two district court cases at *Weiner v. U.S.*, 389 F.3d 152 (2004).[8] Relying on *Beall*, in *Weiner* the Fifth Circuit held that the district court had jurisdiction over those partners' §6404(e)(1) claims and remanded

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6 Counsel lacks specific knowledge, but there may be AMCOR related §6404(e)(1) refund cases currently pending or waiting to be filed other than those represented by the undersigned counsel.

7 Unless otherwise indicated all references to section, §, and the Code are to the Internal Revenue Code at 26 U.S.C. References to §1346(a)(1) and §1491(a)(1) are to 28 U.S.C.

8 The Fifth Circuit vacated and remanded the dismissal for lack of jurisdiction over plaintiffs' §6404(e)(1) claims at *Weiner v. U.S.*, 213 F.Supp.2d 728 (S.D.Tex., 2002); *Kraemer v. U.S.* , 2002 Wl 575791 (S.D.Tex., 2002) (unpublished).

Weiner's claims for consideration on the merits.

Morris Weiner and John Hinck were both limited partners in Agri-Cal Venture Associates. In the Fifth Circuit Morris Weiner has the right to a determination on the merits of his claim for refund in federal district court. The Federal Circuit denies that same right to John Hinck in the Court of Federal Claims.

2. Summary of the Proceedings

The IRS examined the AMCOR partnership returns and ultimately assessed related tax and interest against the individual partners, including Weiner, the Bealls, and the Hincks.

All three paid their assessments and filed identical claims for refund under §6404(e)(1), which the IRS denied. App. 4, 19.

Beall filed suit in the Federal District Court for the Eastern District of Texas, App. 19, and Weiner filed in the Southern District of Texas. *Beall* was the lead case on the §6404 issue and *Weiner* on the other issues. The Hincks later filed suit to recover on their claims in the Court of Federal Claims. App. 4.

In both *Beall* and *Hinck*, the government filed Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction, App. 4, 19, asserting that §6404(e)(1) claims are still not justiciable and the federal district courts and the Court of Federal Claims lack jurisdiction to consider those claims because TBOR2 granted the Tax Court exclusive jurisdiction over §6404(e)(1). App. 5, 19.

The Bealls and the Hincks responded that a prior line of authority unanimously held the district courts and the Court of Federal Claims had refund jurisdiction over §6404(e)(1) claims under §§1346(1)(1) and 1491(a)(1), but were barred from exercising that jurisdiction because (i) the

IRS had total discretion over §6404(e) abatements, and (ii) the claims were not justiciable because of a perceived lack of a standard for reviewing the IRS's decision to grant or deny the abatement.[9] Over time, the analysis behind the original refusal to exercise jurisdiction became blurred and courts relying on those cases came to incorrectly refer to their "lack of jurisdiction" over §6404(e)(1) interest abatement claims.[10]

The Bealls and the Hincks both asserted that by giving the Tax Court jurisdiction and setting abuse of discretion as the standard of review, the 1996 amendments clarified that the IRS does not have total discretion over §6404(e)(1) abatement claims and they are justiciable. Consequently, the district courts and Court of Federal Claims should no longer have been precluded from exercising jurisdiction over §6404(e)(1) refund claims. Both the Hincks and Bealls asserted that nothing in the amendments or legislative history indicated Congress intended to limit or repeal that §§1346(a)(1) and 1491(a)(1) jurisdiction and vest the Tax Court with "exclusive" jurisdiction over §6404(e)(1) claims.

On June 27, 2003, the Fifth Circuit issued its opinion in *Beall*, addressing the same substantive legal and factual arguments raised below in *Hinck*. App. 18-38. The Fifth Circuit exhaustively analyzed §1346(a)(1) and §7422(a)*vis a vis* §6404(e)(1), App. 20-26, found that claims for refund

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9 *E.g., Selman v. U.S.*, 941 F.2d 1060, 1062 (10th Cir. 1991); and *Horton Homes, Inc. v. U.S.*, 936 F.2d 548, 550 (11th Cir. 1991). Judge Allegra issued the Court of Federal Claims decision in this case and was one of the government's appellate attorneys of record in *Horton Homes*. That opinion references an unpublished Federal Circuit opinion that likewise held the Court of Federal Claims had §1346(a)(1) jurisdiction over §6404(e)(1) claims. *Kapp v. U.S.*, 989 F.2d 1202 (Table), 1993 WL 26728 (Fed.Cir. 1993). Judge Lourie authored both *Hinck* and *Kapp*.

10 *Argabright v. U.S.*, 35 F.3d 472, 475 (9th Cir. 1994)

under §6404(e)(1) fit squarely within §1346(a)(1)and §7422(a), App. 26, and held the issues precluding the exercise of jurisdiction had been addressed by the 1996 amendments. App. 30. The Fifth Circuit was not persuaded that the grant of jurisdiction to the Tax Court automatically and silently repealed or limited §1346(a)(1) jurisdiction over §6404(e)(1) claims for refund. App. 35-36.

The Fifth Circuit was persuaded that §6404(h) was added due to the limited nature of the Tax Court's jurisdiction, which is required to be set out in the Tax Code, and nothing more should be read into the grant because nothing in the statute or legislative history indicated Congress meant for the grant to be exclusive. App. 36-37.

In 2006, the Federal Circuit held in *Hinck* that the grant of jurisdiction to the Tax Court was exclusive and, consequently, the Court of Federal Claims did not have jurisdiction over §6404(e)(1) claims. App. 11-12. The Federal Circuit based its decision only on the amendments and accompanying legislative history and did not consider the §1346(a)(1), §1491(a)(1), and §7422(a) jurisdictional scheme nor the relationship of that scheme to the Tax Court's limited jurisdiction under §7442. App. 13-15.

The Federal Circuit's conclusion is at odds with the carefully crafted scheme of tax jurisdiction set out by Congress and this Court and is directly at odds with the Fifth Circuit's decision in *Beall*. That split in authority over the fundamental jurisdiction of the courts is irreconcilable. The analysis by the two circuits are in diametric disagreement, and the Federal Circuit acknowledges its complete disagreement with the Fifth Circuit. App. 16.

The issue in this case – whether taxpayers have recourse in a refund suit in the Court of Federal Claims if the IRS fails or refuses to abate interest that has accrued as a result of IRS errors or delays in performing a ministerial act – is exactly the same issue in *Beall* and is controlled by

the same jurisdictional and Internal Revenue Code sections and judicial precedent.

3. The Jurisdictional Facts Are Uncontested

Only the facts relevant to establishing jurisdiction were set out below. App. 4-5. The Federal Circuit specifically noted that the facts are not disputed. App. 4.

The Hincks filed a joint federal income tax return for 1986. Ten years later, in May 1996, while their 1986 return was under investigation by the IRS, the Hincks made an advance remittance of $93,890.00 towards any income tax deficiency for that year. The IRS later assessed $16,409.00 in additional tax and $21,669.22 in interest against the Hincks for 1986.On February 14, 2000, the IRS applied the advance remittance to the total amount owed by the Hincks and refunded them the balance of $55,811.78. On June 14, 2000, the Hincks filed a claim for refund under §6404(e)(1) for interest from March 21, 1989 until April 1, 1993, due to IRS errors and delays. The IRS denied the Hincks' request on April 30, 2001.

On April 20, 2003, the Hincks filed suit in the United States Court of Federal Claims under §§1346(a)(1) and 1491(a)(1) seeking review of the IRS's refusal to abate the interest and refund of the overpayment. The government moved to dismiss the suit for lack of jurisdiction under RCFC 12(b)(1). On February 3, 2005, the Court of Federal Claims granted the government's motion and dismissed the Hincks' §6404(e)(1) suit for lack of jurisdiction. Judgment was entered February 4, 2005. On March 17, 2005, the Hincks paid the fees and timely appealed to the Federal Circuit under 28 U.S.C. §1295(a)(3).

On May 4, 2006, the Federal Circuit issued its opinion affirming the dismissal for lack of jurisdiction.

REASONS TO GRANT THE PETITION

The decision of the Federal Circuit expressly conflicts with the prior decision of the Fifth Circuit on the same issue – whether the 1996 grant of jurisdiction to the Tax Court at 26 U.S.C. §6404(h) is exclusive over all §6404(e)(1) cases and thus deprives the district courts and Court of Federal Claims of jurisdiction over §6404(e)(1) refund claims. The Federal Circuit's decision left investors within the same partnership with completely different rights and remedies depending on the court in which their case is currently pending. In addition to the AMCOR related §6404(e)(1) decisions at issue, over one hundred other decisions have been issued by various district courts, the Court of Federal Claims, and the Tax Court since the 1996 amendments. The particular issues in this petition have been actively litigated in the district courts and Court of Federal Claims with a plethora of approaches and outcomes. This issue begs for guidance and is not likely to resolve itself.

1. There is a Direct and Express Conflict Between the Fifth Circuit and the Federal Circuit On the Same Issue

The Federal Circuit expressly recognized that its holding is contrary to the Fifth Circuit's decision in *Beall*. App. 16. The two courts split not only on the ultimate determination over whether the Tax Court has exclusive jurisdiction over §6404(e)(1) claims, but in their conclusions with respect to the underlying issues as well. The split is clear and irreconcilable.

a. The Two Courts Have Approached the Issue from Irreconcilable Positions and the Decision of the Federal Circuit Cannot Be Squared With Jurisdictional Statues or This Court's Precedent

The Federal Circuit did not look to or consider the Court of Federal Claims' general grant of jurisdiction at §1346(a)(1) and §1491(a)(1). That court looked only to the language of §6404(h) to determine that Congress intended the Tax Court to be the sole forum for §6404(e)(1) claims. App. 11-12. In summary, the Federal Circuit was persuaded that the grant of jurisdiction was exclusive because the statute references only the Tax Court. App. 12. The Federal Circuit "confirmed" its view by citing this Court's precedent regarding judicial deference to administrative agency determinations and concluded that Congress intended the Tax Court to have exclusive jurisdiction to review §6404(e)(1) denials because of its tax expertise. App. 13-14.

In *Flora*, the government urged this Court to adopt the same "plain language" approach. This Court declined, noting that if the statutory language alone was so clear, then presumably the courts "could but recite the statute and enter judgment" and "might be pardoned some perplexity as to how such a simple matter could have caused so much confusion."[11] But this Court recognized that "this facile an approach will not serve" with respect to a question of such considerable importance in the administration of the tax laws.[12]

The Fifth Circuit examined the jurisdictional challenge within the general jurisdictional scheme. App. 20-26. The Fifth Circuit correctly held that reading the grant of jurisdiction to the Tax Court as exclusive of jurisdiction in

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[11] *Flora* at 148.

[12] *Flora* at 148.

the district courts was inconsistent with the general structure of the Internal Revenue Code and the jurisdictional limitations on the Tax Court. After exhaustive analysis, the Fifth Circuit concluded that claims for refund of interest under §6404(e)(1) fit squarely within the jurisdictional grant at §1346(a)(1) and sovereign immunity was waived by §7422(a). The Fifth Circuit joined the other circuits that had earlier reached the same conclusion. App. 26. The Fifth Circuit further concluded that the 1996 amendments clarified that Congress intended the decision to abate interest was no longer discretionary. App. 30.

In considering the impact of the grant of jurisdiction to the Tax Court, the Fifth Circuit followed this Court's precedent that district courts (and the Court of Federal Claims) have *refund* jurisdiction over disputed taxes, while the Tax Court generally has *prepayment* jurisdiction over disputed taxes.[13] App. 36. As the Fifth Circuit recognized in *Beall*, there are two general forums for resolving federal tax controversies: (i) filing suit in the Tax Court before paying the tax[14], or (ii) paying the tax and then filing a refund suit in federal district court or the Court of Federal Claims. [15] App. 36. The Tax Court has refund jurisdiction only when an action is already pending before it in a disputed tax deficiency case and in some limited instances §6404(e)(1)

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[13] *Flora v. U.S.*, 362 U.S. 145, 149 (1960)

[14] The Tax Court does have limited overpayment jurisdiction in certain circumstances. If a prepayment petition is filed in the Tax Court to contest a tax deficiency, the Tax Court then acquires limited additional jurisdiction to make overpayment determinations related to the deficiency determination *that is at issue in the petition* . §6512(b). Section 6404(h)(2)(B) states that "[r]ules similar to the rules of §6512(b) apply for purposes of this subsection." It also has limited refund jurisdiction over interest overpayments under §7481(c).

[15] §6213; §1346(a)(1); *Flora*, 362 U.S. at 157.

errors and delays.[16] App. 36.

When faced with an IRS proposal to assess tax, penalties or *interest*, *Flora* recognized that the broad language of §§1346(a)(1) and §1491(a)(1) grant the district courts and the Court of Federal Claims subject matter jurisdiction over all taxpayer defenses and challenges to those assessments, but only if the taxpayer first pays the full amount of the assessment and files a refund claim.

Alternatively, a taxpayer can escape the harsh prepayment requirement and file suit in the Tax Court to challenge the proposed tax deficiency, penalty, or in limited cases to abate interest under §6404(e). But the Fifth Circuit recognized and was persuaded that the Tax Court, by statute has extremely limited jurisdiction and has "only such power to adjudicate controversies as is conferred upon it by the Internal Revenue Code."[17] App. 36-37. This is so because the Tax Court lacks a "general" grant of jurisdiction similar to §1346(a)(1) or §1491(a)(1). The statute conferring subject matter jurisdiction to the Tax Court, 26 U.S.C. §7442, confines and limits the Tax Court's jurisdiction to the matters expressly and specifically parsed out, section by section in the Internal Revenue Code[18] – such as the explicit limited grant of jurisdiction over §6404(e)(1) cases set out at §6404. There is no precedent for reading these discrete limited jurisdictional grants under §7442, which are required to be expressly set out in the Tax Code, as exclusive to the Tax Court depriving the district courts and Court of Claims of their general refund jurisdiction. There

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16 §6512, §7481(c) and §6404(h)(2)(B); *508 Clinton St.* at 355.

17 *Continental Equities, Inc. v. C.I.R.*, 551 F.2d 74, 79 (5th Cir. 1977), *aff'g in part & rev'g in part* T.C. Memo 1974-189.

18 *Estate of Baumgardner v. C.I.R.*, 85 T.C. 445 (1985)("Our jurisdiction is limited by statute (section 7442)...").

is especially no precedent that these discrete provisions deprive the district courts or Court of Federal Claims of acknowledged and well-settled jurisdiction.

Consequently, it is well settled that the Tax Court lacks jurisdiction over refund suits, except those brought in conjunction with a deficiency proceeding or, in limited circumstances, §6404(e)(1) suits brought under §6404(h)(1). *Id.* Section 6404(h)(2) grants the Tax Court refund jurisdiction pursuant to the rules established at §6512(b) to determine an overpayment in a §6404(h)(1) case.

It is also well settled that the Tax Court generally lacks jurisdiction to make interest determinations, except those brought in conjunction with a tax deficiency proceeding. *Id.* Therefore, it was necessary for Congress to add §6404(h) to expressly grant the Tax Court any prepayment jurisdiction over requests for interest abatement brought pursuant to §6404(e)(1).[19] Otherwise, taxpayers who did not dispute the proposed tax assessment but did dispute the interest abatement issue would have no prepayment opportunity to assert their right to challenge the excessive interest pursuant to §6404(e)(1). Section §6404(h)(1) is a grant of prepayment jurisdiction.

In contrast, the Tax Court held it totally lacked subject matter jurisdiction over prepayment §6404(e)(1) claims and, in the limited cases where it had overpayment jurisdiction, it followed the circuit courts' analysis that §6404(e)(1) was discretionary and, therefore, beyond the scope of judicial

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[19] *508 Clinton, supra.* (recognizing that Tax Court jurisdiction is limited by §7442, as a general rule the Tax Court lacks jurisdiction over interest, holding the Tax Court lacked jurisdiction over §6404(e)(1) claims in a deficiency proceeding, and suggesting that Congress could rectify the lack of jurisdiction with an express, statutory grant of jurisdiction).

review.[20]

When Congress has chosen to create exclusive jurisdiction and/or limit §1346(a)(1) and §1491(a)(1) jurisdiction it has used appropriate statutory language.[21] Had Congress intended to do so here it would have.

The Federal Circuit was presented with the same arguments and authorities as the Fifth Circuit but declined to reach or consider these issues and consequently issued a decision contrary to the better reasoned and more authoritative decision issued by the Fifth Circuit.

b. The Two Courts Disagree on the Conclusions to be Drawn from Legislative History

With respect to the legislative history to the §6404 amendments, both courts considered the House Report accompanying TBOR2,[22] but reached completely different, irreconcilable conclusions. The Federal Circuit only analyzed the language of the Report. App. 13-17. The Fifth Circuit considered that same language, but in the context of precedent and the existing jurisdictional scheme for tax litigation. App. 32-37.

The Federal Circuit was persuaded that Congress' statement of "Present Law" in the first sentence of the legislative history to the amendments – "Federal courts

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[20] *See, 508 Clinton Street Corp., v. C.I.R..*, 89 T.C. 352 (1987); *Asciutto v. C.I.R.*, 64 T.C.M. 877 (1992); *Bax v. C.I.R.*, 13 F.3d 54, 57 (2 nd Cir. 1993).

[21] See §6110(j)(1)(B) (Taxpayer "shall have as an **exclusive** civil remedy an action against the Secretary in the United States Claims Court." [Emphasis added.] See also §7422(a) and §6511(a) which expressly limit refund jurisdiction and condition the waiver of immunity. Section 6404 has no such statutory language of exclusion or limitation.

[22] H.R.Rep. No. 104-506, at 28 (1996). App. 62.

generally do not have jurisdiction to review the IRS's failures to abate interest." – was a plain declaration that the courts lack §6404(e)(1) jurisdiction. App. 13-15.

In a more nuanced reading that recognized the actual holdings in the early §6404(e)(1) cases, the Fifth Circuit concluded from that statement that Congress was aware of the *Horton Homes* line of cases and was aware those cases had not held that federal courts lacked "jurisdiction," but were precluded from exercising their jurisdiction over §6404(e)(1) claims. App. 32-34. The Fifth Circuit's approach follows the presumption that Congress acts with knowledge of existing law and judicial concepts and if Congress intends to change the judicial interpretation or concept, it makes that intent specific – which Congress did not do.[23]

The Federal Circuit was also persuaded that the Committee's failure to mention or expressly grant jurisdiction to the district courts and the Court of Federal Claims in the legislative history, while in contrast plainly granting the Tax Court jurisdiction to consider interest abatement claims, meant that Congress intended to vest jurisdiction exclusively in the Tax Court. App. 11-12, 14. But, as discussed above, there is no supporting precedent for that approach.

In contrast, the Fifth Circuit drew a different conclusion and was persuaded that "Congress nowhere stated in the 1996 amendments that the district courts *did not* have jurisdiction to review interest abatement denials." App. 33.

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[23] *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382, n. 66, 102 S.Ct. 1825, 1841, n. 66, 72 L.Ed.2d 182 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-581, 98 S.Ct. 866, 869-870, 55 L.Ed.2d 40 (1978). *See also Midlantic Nat'l Bank v. N.J. Dep't Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).

Moreover, the court relied on the Report's express direction that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." App. 33. The Fifth Circuit also specifically noted that reading the absence of a reference to district courts as an exclusive grant of jurisdiction to the Tax Court – the approach urged by the government and later adopted by the Federal Circuit – would impliedly repeal the district courts' (and the Court of Federal Claims') existing jurisdiction. App. 34. The Fifth Circuit cited and followed this Court's precedent that repeals by implication are disfavored.[24] App. 34.

Finally, the Federal Circuit erroneously buttressed the conclusions it drew from the legislative history to the 1996 amendments by referencing ambiguous language in the legislative history to a later proposed, but never passed, Taxpayer Bill of Rights 2000.[25] App. 14-15. The legislation to which that Report relates, H.R. 4163, was never enacted.[26] As this Court has said, "unenacted approvals, beliefs, and desires are not laws."[27] To borrow from Justice

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[24] *See Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988).

[25] H.R.Rep. No. 106-566, at 32 (2000). App. 64.

[26] H.R. 4163 passed the House on April 11, 2000, and was referred to the Senate on April 12, 2000. The legislation never left the Senate Finance Committee.

[27] *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 108 S.Ct. 1350, 1354, 99 L.Ed.2d 582 (1988). *See also Ratzlaf v. U.S.*, 510 U.S. 135, n.18, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)("We do not find that Report, commenting on a bill that did not pass, a secure indicator of congressional intent at any time, and it surely affords no reliable guide to Congress' intent in 1986. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979) (cautioning against giving weight to "history" written years after

Scalia, "[t]oday's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. ... This is beyond all reason, and we should say so."

2. The Federal Circuit's Approach Is not Supported by Clear and Convincing Evidence

"We begin with the strong presumption that Congress intends judicial review of administrative action." [28] The government bears a "heavy burden" of proof when arguing against the presumption in favor of review.[29] Congress intended that citizens should be denied judicial access only where the government has produced "clear and convincing" evidence against judicial review.[30]

The pre-TBOR2 §6404(e)(1) cases recognized the presumption in favor of judicial review of agency actions and that this presumption can only be overcome by clear and convincing evidence of contrary legislative intent. [31] "Clear and convincing" evidence requires that the existence

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the passage of a statute)").

[28] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339-353 (1965), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 166, 2 L.Ed. 60 (1803).

[29] *Bullard v. Webster*, 623 F.2d 1042, 1045 (5th Cir. 1980) ("[B]urden of proving nonreviewability is [on] agency involved."), *citing Abbott Labs.*

[30] *Brahms v. U.S.*, 18 Cl.Ct. 471, 475 (1989), *citing Abbott Labs*, 387 U.S. at 140-41; *Kirby Corp. v. Pena*, 109 F.3d 258, 261-262 (5th Cir. 1997), *citing Bowen* at 670; and *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975).

[31] *Brahms* at 475; *Argabright* at 476; *Selman* at 1064; *Horton Homes* at 551.

of the disputed fact be "highly probable."[32] It is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case."[33]

The Federal Circuit's repeal by implication is not supported by "clear and convincing evidence." Its approach and final decision are contrary to the general scheme of jurisdiction and not consistent with legislative history properly read in the context of that jurisdictional scheme.

3. The Conflict is Not Likely to be Resolved Without this Court's Guidance

As can be seen from the number of §6404(e)(1) decisions filed by the district courts and Court of Federal Claims since 1996, this is an actively litigated issue.[34]

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[32] *Am. Pro. Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

[33] *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 285 n. 11, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

[34] *U.S. v. Davenport*, ___ F.Supp.2d ___, 2006 WL 1555845 (W.D. OK, June 5, 2006)(recognizing 10th Circuit precedent in *Selman* but following *Hinck* in an action filed by *pro se* taxpayers); *Ballhaus v. I.R.S..*, 341 F.Supp.2d 1145 (D.Nev.2005)(action filed by *pro se* taxpayer); *Kraemer, supra.* (issued prior to *Beall* and overturned on consolidated appeal at *Weiner*, 389 F.3d 152; *Dogwood Forest Rest Home, Inc. v. U.S.*, 181 F.Supp.2d 554 (M.D.N.C.2001)(issued prior to *Beall*); *Davies v. U.S.*, 124 F.Supp.2d 717 (D.Me.2000)(issued prior to *Beall*); *Henderson v. U.S.*, 95 F.Supp.2d 995 (E.D.Wis.2000)(issued prior to *Beall*). *Leiter v. U.S.*, 2004 WL 303210 (D.Kan.)(following *Beall*); *Hudson v. I.R.S.*, 2004 W.L. 1006266 (N.D.N.Y.)(*in dicta*, §6404(e)(1) discretionary with IRS); *U.S. v. Ripa*, 323 F.3d 73 (2nd Cir. 2003)(in *dicta*, 1996 amendments reinforces holding in *Bax* that §6404(e)(1) determination is solely discretionary with the IRS); *Brewer v. Baugh*, 370 F.Supp.2d 988 (D.Ariz.,2005) (following *Ballhaus*, §6404(e)(1) is discretionary and Tax Court has exclusive jurisdiction); *In re 1900 M Restaurant Assoc., Inc.*,319 B.R. 302 (Bkrtcy,.D.Dist.Col., 2005)(noting *Beall* with favor in *dicta*); *Hirshfield v.*

The Federal Circuit was persuaded that its approach was correct because its decision was consistent with five other district court decisions that also concluded the Tax Court has exclusive jurisdiction over §6404(e)(1) claims. App. 7-8. But the Federal Circuit's reliance on that subordinate authority is misplaced. Three of those district court decisions were issued prior to *Beall* and their analysis was also void of any reference to or consideration of the well-settled and accepted jurisdictional scheme for resolving tax controversies.[35] One of those district court decisions was expressly overturned on appeal pursuant to *Beall*.[36] The fifth decision was issued against an unsophisticated, *pro se* plaintiff who was not familiar with tax law or procedure.[37]

In general, federal appellate courts accord great weight to the decisions of their sister circuits when the same or similar issues come before them and they do not create conflicts among the circuits without strong cause.[38] Further they have long recognized that the need for uniformity applies with special force in tax cases.[39] Such uniformity among the circuits is particularly desirable in tax cases to

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U.S, 2001 WL 579783 (S.D.N.Y.,2001)(unpublished, holding §6404(e)(1) totally discretionary) *In re Karlsson* 247 B.R. 321 (Bkrtcy.M.D.Fla., 2000) (holding §6404(e)(1) totally discretionary - issued before *Beall*).

35 *Dogwood Forest, supra.*, (issued prior to *Beall*); *Davies, supra.*, (issued prior to *Beall*); *Henderson, supra.*, (issued prior to *Beall*).

36 *Kraemer*, reversed in consolidated appeal under *Weiner, supra*.

37 *Ballhaus, supra*

38 *Admiral Financial Corp. v. U.S.*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) *citing Washington Energy Co. v. U.S.*, 94 F.3d 1557, 1561 (Fed.Cir.1996).

39 *Washington Energy* at 1561, and cases cited therein.

ensure equal application of the tax system to all citizens, and federal appellate courts should not reach a result in conflict with a sister circuit unless the statute at issue or precedent of that court gives them no alternative.[40]

The divergent approaches and conclusions reached in those five cases and in the other §6404(e)(1) refund cases decided since 1996, graphically illustrates just how badly the uniformity that is particularly desirable in tax cases has been shattered with respect to this issue. These fractures can only be resolved with this Court's guidance.

The Federal Circuit's holding also has broader implications, foreshadowing challenges to the district courts' and Court of Federal Claim's jurisdiction in other areas of the tax law. This is especially likely where the Tax Court's §7442 specific grants of jurisdiction have historically been treated as creating concurrent jurisdiction with courts that have pre-existing jurisdiction over that same issue. The ramifications of allowing the Federal Circuit's determination to stand illustrates why this issue is one of such importance that it demands this Court's review and guidance.

4. <u>The Conflict Is Over an Important Matter that Demands the Court's Attention</u>

a. The Federal Circuit's Decision Unhinges the Well-Established, Integrated, and Uniform Jurisdictional Scheme Between the District Courts and the Court of Federal Claims

While uniformity in the tax laws in general is a goal that this Court is mindful of, the mandate for uniformity between the jurisdiction of the district courts and the Court of Federal Claims is of specific importance. As this Court

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[40] *Washington Energy* at 1561, citing *Gibraltar Fin. Corp. v. U.S.*, 825 F.2d 1568, 1572 (Fed.Cir.1987).

has pointed out, Congress passed the Tucker Act to provide for expeditious and orderly determination of claims against the government.[41] This relief "demanded an integrated jurisdictional plan" between the Court of Federal Claims and the district courts and "[u]niformity and equality in substantial rights and privileges – for claimants in both forums – were essential features of the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation." *Id.* Based on Mr. Tucker's statements in the legislative history to §§1346(a)(1) and 1491(a)(1), this Court has held that the substantial rights of claimants are to be governed alike in the Court of Federal Claims and the district courts. *Id.*

The split in this case is not a mere difference of opinion between the courts regarding standards of review or factors to be considered in making a determination on the merits. The split in this case has fundamentally severed the integrated, uniform jurisdictional plan between the district courts and the Court of Federal Claims. Taxpayers now have the right to file a §6404(e)(1) refund suit in the district courts of the Fifth Circuit if there is personal jurisdiction but not in the court that was specifically created to allow plaintiffs to sue the government regardless of personal jurisdiction or venue.

b. The Federal Circuit's Decision Displaces the Keystone of the Carefully Articulated and Complex Jurisdictional Scheme of Tax Laws

In *Flora*, this Court construed §1346(a)(1) and also articulated the crux of this case, "We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a

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41 *Bates Mfg. Co. v. U.S.*, 303 U.S. 567, 570-71, 58 S.Ct. 694, 82 L.Ed. 1020 (1938).

carefully articulated and quite complicated structure of tax laws."[42] The Federal Circuit's decision below undoes this jurisdictional scheme.

By expansively holding that the specific grant of jurisdiction allowing the Tax Court to make determinations with respect to some limited §6404(e)(1) claims also gives the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, the Federal Circuit has impliedly repealed §1346(a)(1) in every instance where the Tax Court has been granted concurrent jurisdiction with the district courts and the Court of Federal Claims over a particular issue.

For example, §6621(c) (now repealed but still effective for tax returns due prior to 1990 and at issue in the AMCOR cases) imposed an increased "penalty" rate of interest on substantial underpayments attributable to tax motivated transactions (TMTs). Congress expressly gave the Tax Court jurisdiction in §6621(c)(4) to make prepayment TMT interest determinations in a partner's individual tax deficiency case even though it does not normally have jurisdiction to determine interest.[43] The Tax Code is silent with respect to district court and Court of Federal Claims jurisdiction over §6621(c). But the fact that this grant was made does not automatically mean the Tax Court has exclusive jurisdiction over the §6621(c) issue. The IRS has never asserted that §6621(c)(4) is an exclusive grant of jurisdiction to the Tax Court. The case law is replete with prepayment §6621(c) suits in the Tax Court and post-payment §6621(c) refund suits in the federal

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42 *Flora*, 362 U.S. at 157.

43 *508 Clinton Street Corp*, at 356 and n.9.

district courts and Court of Federal Claims.[44] The Tax Court has recognized it can only hear a §6621(c) refund claim in a case already pending pursuant to its general tax deficiency jurisdiction.[45]

When an express grant of jurisdiction to the district courts and/or Court of Federal Claims is necessary, Congress does so. For example, 26 U.S.C. §6330(d)(1)(A) expressly grants the Tax Court jurisdiction to review an IRS collection due process determination. Federal district courts and Court of Federal Claims do not have §1346(a)(1), §1491(a)(1), or other jurisdiction over collection due process determinations. Consequently, it was necessary for Congress to expressly grant those courts jurisdiction, which it did at §6330(d)(1)(B). Section 6330(d)(1)(B) grants the district courts jurisdiction in the event the Tax Court does not have jurisdiction over the underlying tax liability.[46]

The Federal Circuit's decision would deny the district courts and the Court of Federal Claims jurisdiction not only over §6404(e)(1) refund claims, but also over 26 U.S.C. §6621(c) refund claims, as well as a host of other discrete claims. The holding is potentially far reaching, and this Court should expect the IRS will make the most of it to deny taxpayers access to the district courts and Court of Federal Claims in cases other than §6404(e)(1) cases.

The Court should expect the IRS and the courts to

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[44] *E.g. Hirschfield v. U.S.*, 2001-2 USTC ¶50,480, ___ F.Supp.2d ___ (E.D.N.Y. 2001) (a post payment refund suit filed in federal district court) and *Heasley v. C.I.R.*, 902 F.3d 380 (5th Cir. 1990) (a prepayment suit filed in Tax Court).

[45] *Barton v C.I.R.*, 97 T.C. 548 (1991), *citing White v. C.I.R.*, 95 T.C. 209 (1990).

[46] *Gorospe v. Commissioner*, ___ F.3d ___, 2006 WL 1687398 (9th Cir. June 21, 2006).

exploit the weaknesses in the Federal Circuit's decision. Until the 1996 amendments and *Beall*, §6404 interest abatement had historically been the *only* provision of the Tax Code held to be totally discretionary with the IRS. But the IRS recently, *albeit* unsuccessfully, used these same arguments in an attempt to expand its total discretion over §6015(f) equitable innocent spouse relief by asserting that judicial review was barred.[47] The IRS relied on the *Argabright* cases, including *Selman* and *Horton Homes,* to support its defense. With the exception of one bankruptcy court, every reviewing court has held equitable innocent spouse elections are not totally discretionary using the same analysis advanced by the Hincks and the Bealls and adopted by the Fifth Circuit.[48]

For example, in *Butler* the IRS asserted the Secretary's authority to grant equitable relief was totally discretionary. But the Tax Court recognized that the "committed to agency discretion" exception to the general rule of judicial review is very narrow and applies only in those rare instances where the statute is drawn in such broad terms that there is no law to apply.

The Tax Court held that "we are well equipped to decide whether it was an abuse of discretion for [the IRS] to deny relief to petitioner under §6015(f)."[49] The Tax Court and Court of Federal Claims all rejected the IRS's attempt to limit judicial review of its innocent spouse determination

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47 §6015(f).

48 See *Butler v. C.I.R.*, 114 T.C. 276 (2000) (rejecting the IRS's *Argabright* defense); *cf. In re Mira*, 245 Bankr. 788 (Bankr. M.D. Pa. 1999).

49 *Butler* at 291-292.

and followed the *Butler* analysis and holding.[50]

c. The Federal Circuit's Decision is Contrary to Congressional Intent to Expand Taxpayer Rights and Access to Judicial Review of §6404(e)(1) Claims

The legislative history to §6404(e)(1) proves Congress believed the IRS was "inappropriately" charging interest as a result of its own errors and delays and meant for the IRS to abate that interest. Unfortunately, the IRS refused to self-correct and 10 years later Congress was forced to use TBOR2 to rectify the IRS's continuing refusal to exercise its §6404(e)(1) abatement authority.

The overview of the legislative history to the original enactment of §6404(e)(1) clearly favors review: "After nearly a year of hearings, the committee concluded that only the most thorough reform could assure a simpler, fairer, and more efficient tax system which could regain the trust of the American people."[51]

The specific history to §6404(e)(1) is even more insistent:

> Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays.... In some cases, the IRS has admitted that its own errors and delays have caused taxpayers to incur additional interest charges. ... The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, ... authority should be available for

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[50] *Fernandez v. C.I.R.*, 114 T.C. 324 (2000); *Charlton v. C.I.R.*, 114 T.C. 333 (2000); *Flores v. U.S.*, 51 Fed. Cl. 49 (2001).

[51] H.R. CONF. REP. 99-841, Overview (1985).

> the IRS to abate the interest independent of the underlying tax liability.[52]

In *Banat* the Tax Court correctly found that the objective of TBOR2 with regard to §§6404(e) and (h) was to *expand*, not restrict, taxpayers' rights and access to judicial review:

> TBOR2 is intended by the Congress "to **provide for increased protections** of taxpayer rights in complying with the Internal Revenue Code and in dealing with the Internal Revenue Service (IRS) in its administration of the tax laws." H.Rept. 104-506, at 22 (1996)-2 C.B.– [53]

Any assertion that TBOR2 was intended to restrict taxpayer rights to judicial review and relief is antithetic to the bill's true purpose and should be rejected by this Court.

d. The Federal Circuit's Decision Impermissibly Denies Taxpayer's Due Process

Both Circuits recognized that repealing the existing §6404(e)(1) refund jurisdiction of the district courts and Court of Federal Claims would cause two anomalies: (i) a taxpayer's right to judicial review of the IRS's abatement denials would be determined solely by his net worth, and (ii) certain taxpayers would be forced to "split" their claims. App. 16-17, 36-37. But both anomalies violate taxpayer constitutional due process rights.

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[52] H.R. CONF. REP. 99-841, 4898-4899 (1985). App. 57-58.

[53] *Banat v. C.I.R.*, 79 TCM (CCH) 1941 (2000), *aff'd on other grounds without published opinion* 2001-1 USTC ¶50,296 (2nd Cir. 2001). [Emphasis added.] The Tax Court hears pre-1996 claims and decides them using the pre-1996 version of §6404(e).

i. The Federal Circuit's Interpretation Violates the Constitutional Due Process Rights of All Individual Taxpayers with a Net Worth of Over $2,000,000 and Other Taxpayers with a Net Worth over $7,000,000

Section 6404(h) grants the Tax Court jurisdiction to review for abuse of discretion IRS decisions not to abate interest under §6404(e)(1), but only "jurisdiction over any [such] action brought by a taxpayer who meets the requirements referred to in §7430(c)(4)(A)(ii)." App. 42. Section 7430(c)(4)(A)(ii) requires that the taxpayer meet "the requirements of §2412(d)(2)(B) of such title 28." App. 49. Section 2412(d)(2)(B) provides, *inter alia*, that "'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) [other entities, including corporations] the net worth of which did not exceed $7,000,000 at the time the civil action was filed ...." App. 54.

Both the Fifth Circuit and the Federal Circuit recognized that if §6404(h) gave the Tax Court exclusive jurisdiction over all IRS denials of §6404(e)(1) abatement claims then individual taxpayers with a net worth of under $2,000,000 would be allowed judicial review in the Tax Court; taxpayers with a net worth of over $2,000,000 "would be left entirely without recourse." App. 4,16,36 fn. 15, 37. In *Beall* the Fifth Circuit found this denial of rights based solely on personal wealth unacceptable. App. 37. In *Hinck* the Federal Circuit rejected the Fifth Circuit's concerns and stated that by granting prepayment review in the Tax Court but restricting it to "certain taxpayers," those with a net worth of less that $2,000,000, Congress intended to deny taxpayers with a net worth of over $2,000,000 not only a prepayment forum but any forum whatsoever by simultaneously repealing the existing, *albeit* previously unavailable, refund jurisdiction of the district courts and Court of Federal Claims. App. 16.

The Federal Circuit's interpretation results in an improper taking or conversion of the rights of certain taxpayers, individuals with a net worth over $2,000,000 and probably most corporations, to judicial review when the IRS denies their §6404(e)(1) abatement requests, and violates their substantive and procedural due process rights by denying them any forum in which to raise their claim. [54] This is wholly inconsistent with the grant of relief under §6404(e)(1) being unrestricted to all taxpayers. The restriction only appears in §6404(h) which creates the grant of payment jurisdiction to the Tax Court.

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution[55] including: the Due Process Clauses of the 5 th [56] and 14th [57]Amendments, the Equal Protection Clause,[58] the 6th Amendment,[59] the Privileges and Immunities Clause of

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[54] As a result, there would be no IRS accountability for denying §6404(e)(1) abatement requests made by high net worth individual and corporate taxpayers. *I.R.S. v. Blais*, 612 F.Supp. 700 (D.Mass.1985) ("The law abhors power without accountability. Unpoliced power invites abuse and corruption.").

[55] *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907).

[56] *Am. Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1371 (Fed. Cir. 2004).

[57] *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 2169, 76 L.Ed.2d 277 (1983).

[58] *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994-95, 95 L.Ed.2d 539 (1987).

[59] *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).

Article IV,[60] and the 1st Amendment protection of the right to petition.[61] The Due Process Clause of the 14th Amendment guarantees access to both state and federal courts.[62] This right cannot be infringed upon or burdened.[63] A court of competent jurisdiction is required for legal redress.[64]

Denying only certain taxpayers *any* forum to raise their §6404(e)(1) abatement claim is improper when "under the law there is no other court to which they could go ... [and] could amount to a denial of due process under the 14th amendment to the Constitution."[65]

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[60] *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000), *citing Chambers* at 148; *Ryland v. Shapiro* , 708 F.2d 967,971(5th Cir.1983).

[61] *Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *E. RR Pres. Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127, 138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

[62] *DeWitt v.Pail*, 366 F.2d 682, 685 (9th Cir. 1966), *citing Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963); *Brinkerhoff-Faris Trust & Sa s. Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

[63] *Silver v. Cormier*, 529 F.2d 161, 163 (D.C.Colo. 1976), *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973).

[64] *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

[65] *Atkins v. U.S.*, 556 F.2d 1028, 1040 (Ct.Cl. 1977) *citing Boddie v. Conn.*, 401 U.S. 371, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Xechem I'natl, Inc. v. Univ. of Texas*, 382 F.3d 1324, 1334-35 (Fed. Cir. 2004) concurring opinion. (In an action for a taking or conversion "a factor in the due process provision of the 14th Amendment is whether any remedy is otherwise available. ... [I]f no remedy is indeed available ... by federal preemption of the cause of action – there can arise an affront to the fundamentals of due process."); *Benedict v. Sec. of Dept. of H.H.S.*, 29 Fed.Cl. 587, 594 (1993) ("[T]he guaranty of due process applies to the

ii. The Forced "Claim-Splitting" Urged by the Federal Circuit is Prohibited

The Fifth Circuit recognized that:

> denying district courts the power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. ... [T]hat taxpayer would have to sever his interest abatement claim from his refund claim and pursue the abatement claim separately in the Tax Court. Such splitting of claims is generally considered undesirable, *see, e.g., In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996) (discussing rule against claim-splitting), and we cannot conclude, absent some indication to the contrary, that Congress would have intended such a result. App. 37.

The Federal Circuit again rejected the Fifth Circuit's concerns and stated:

> That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear. App. 17.

But this Court has long recognized that such "claim-splitting" is improper because "the first decision would, of course, control."[66] "To discourage [claim-splitting], judges

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judicial branch as well as the legislative, executive, and administrative branches of government.").

66 *Flora* at 165. See also *U.S. v. Shanbaum*, 10 F.3d 305, 314 (5th Cir. 1994):

> "[A taxpayer's] total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the

award plaintiffs not the better outcome but the first outcome: whichever suit goes to judgment first is dispositive, and the doctrine of claim preclusion (*res judicata*) requires the other court to dismiss the litigation."[67]

By forcing taxpayers to split their claims, the Federal Circuit's interpretation would again cause an unlawful taking or conversion of the taxpayer's right to legal redress as to the claim not decided first.

CONCLUSION

The nature of this administrative action begs for judicial review. For over 10 years the IRS refused to exercise its §6404 interest abatement authority. In 1996, Congress was compelled to make judicial review of IRS abatement determinations explicit to ensure that taxpayers could actually obtain relief from excess interest accrued as a result of IRS errors and delays in performing its ministerial duties. This case is a clear indication that the IRS continues to resist judicial oversight of its determinations with respect to taxpayer rights to interest abatement.

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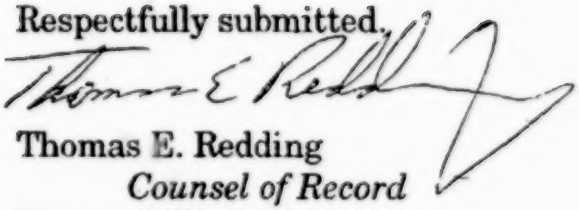
variety of contested issues and points that may bear on the final computation." *Finley v. U.S.*, 612 F.2d 166, 170 (5th Cir.1980). Thus, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year." *C.I.R. v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

67 *Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995).

Respectfully submitted.



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APPENDIX - Table of Contents

Opinion Below:

Hinck v. United States,
446 F.3d 1307 (Fed. Cir. 2006) ..... App. 1

Other Relevant Opinions:

Beall v. United States,
336 F.3d 419 (5th Cir. 2003) ..... App. 18

Statutes for the Tax Years in Issue:

26 U.S.C. (the Internal Revenue Code)
§6015(f) ..... App. 39
§6110(j)(1)(B) ..... App. 40
§6330(d)(1) ..... App. 41
§6404(e)(1) ..... App. 42
§6404(h) ..... App. 42
§6511(a) ..... App. 44
§6512(b) ..... App. 45
§7422(a) ..... App. 48
§7430(c)(4)(A)(ii) ..... App. 49
§7442 ..... App. 50

28 U.S.C. (Judiciary and Judicial Procedure)
§1346(a)(1) ..... App. 51
§1491(a) ..... App. 52
§2412(d)(1)(B) ..... App. 54
§2412(d)(2)(B) ..... App. 54

Other Statutes:

Public Law 104-168, §301(a),
110 Stat. 1452 (1996) ("TBOR2") ..... App. 56

Legislative History:

H.R.Conf. Rep. 99-841 (1985) ..... App. 57
H.R.Rep. No. 104-506 (1996) ..... App. 62
H.R.Rep. No. 106-566 (2000) ..... App. 64

App. 1

United States Court of Appeals for the Federal Circuit

05-5099

JOHN F. HINCK and PAMELA F. HINCK,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: May 4, 2006

Before LOURIE, LINN, and DYK, Circuit Judges.

LOURIE, Circuit Judge.

John and Pamela Hinck (collectively the "Hincks") appeal from the judgment of the United States Court of Federal Claims dismissing their suit for lack of jurisdiction. Hinck v. United States , 64 Fed.Cl. 71 (Fed.Cl.2005). Because the court lacked subject matter jurisdiction over the Hincks' interest abatement claim, we affirm.

BACKGROUND

Section 6404 of the Internal Revenue Code authorizes the Secretary of the Treasury to abate a tax or liability assessment in certain circumstances.[1] In 1986, Congress

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1 Section 6404(a) of the Internal Revenue Code provides as follows:

(a) General rule-The Secretary is authorized to

amended §6404 by adding a new subsection (e)(1) that, for the first time, authorized the Secretary of the Treasury to grant an abatement of interest assessed against a taxpayer. As originally enacted by the Tax Reform Act of 1986, §1563, Pub.L. No. 99-514, 100 Stat.2085, 2762, §6404(e)(1) provided in its entirety as follows:

> (e) ASSESSMENTS OF INTEREST ATTRIBUTABLE TO ERRORS AND DELAYS BY INTERNAL REVENUE SERVICE.-
>
> (1) In General--In the case of any assessment of interest on--
>
> (A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or
>
> (B) any payment of any tax described in section 6212(a) to the extent that any delay in such payment is attributable to such an officer or employee being dilatory in performing a ministerial act,
>
> the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be

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abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which-

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

> attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

26 U.S.C. §6404(e)(1) (1986).

In 1996, Congress enacted the Taxpayer Bill of Rights II, P.L. 104-168, §301(a), 110 Stat. 1452 (1996), which made two changes to §6404. First, it amended §6404(e)(1) by adding the word "unreasonable" before the words "error or delay" and by changing the words "ministerial act" to "ministerial or managerial act." Those changes to §6404(e)(1) were effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996, and thus do not apply to this appeal, which concerns the tax year 1986. Because of the effective date of the §6404(e)(1) change, the original version of §6404(e)(1) thus applies to the Hincks' claim.

The second change involved the addition of the present §6404(h),[2] which provides for review of abatement determinations made by the IRS in the Tax Court as follows:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

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[2] Section 6404(h) was initially designated §6404(g). It was redesignated as §6404(i) by the IRS Restructuring and Reform Act of 1998, Pub L. No. 105-206, and then redesignated as §6404(h) in 2002 by P.L. 107-134, §112(d)(1).

Taxpayer Bill of Rights 2, P.L. 104-168 §301(a) (1996). Section 7430(c)(4)(A)(ii) of Title 26 references 28 U.S.C. §2412(d)(2)(B), and provides that, for purposes of a claim brought under §6404, a taxpayer may not have a net worth of more than $2,000,000 or be the owner of a business worth more than $7,000,000. The addition of §6404(h) applies to requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved, and thus applies to the Hincks' suit. P.L. 104-168 §301(b), (c) (1996).

This appeal arises from a claim by the Hincks to recover tax interest paid for the tax year 1986. The facts are not disputed. The Hincks filed a joint federal income tax return for the tax year 1986. Hinck, 64 Fed.Cl. at 72. Ten years later, in May 1996, while their return for the tax year 1986 was under investigation by the Internal Revenue Service (the "IRS"), the Hincks made an advance remittance of $93,890.00 to the IRS towards any income tax deficiency for that year. *Id.* The IRS later assessed $16,409.00 in additional taxes and $21,669.22 in interest against the Hincks for the taxable year 1986. Id. On February 14, 2000, the IRS applied the advance remittance payment to the total amount owed by the Hincks and refunded them the balance, $55,811.78. Id. On June 14, 2000, the Hincks filed a claim for a refund, which included a request that, to IRS errors and delays, interest assessed against the Hincks should be abated, pursuant to §6404(e)(1) of the Internal Revenue Code, for the period from March 21, 1989, until April 1, 1993. Id. at 72-73. The IRS denied the Hincks' request on April 30, 2001. Id. at 73.

On April 20, 2003, the Hincks filed suit in the United States Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Id. The government moved to dismiss the suit for lack of jurisdiction. On February 3, 2005, the court granted that motion. The court first determined that it possessed subject matter jurisdiction over tax refund claims under the Tucker Act, 28 U.S.C.

§1491(a), which provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department ..." Id. at 76. It concluded, however, that it still could not review the IRS's determination whether to abate the interest under I.R.C. §6404(e)(1).

The court noted that prior to 1996, several cases had held that tax abatement determinations under §6404(e)(1) are not judicially reviewable because the IRS has sole discretion to abate interest and there are no tests or standards by which to adjudicate the correctness of the IRS's determination. But, in 1996, §6404 had been amended to include §6404(h), which provides that the Tax Court shall have jurisdiction to review abatement determinations. The trial court analyzed the statutory language of the amended version of §6404 and its legislative history and determined that §6404(h) did not disturb the holdings of the prior decisions, and that the rationale set forth in those decisions that there was no appeal from denial of interest abatement decisions was still applicable. Thus, the court determined that only the Tax Court, not the Court of Federal Claims, could review interest abatement determinations by the IRS.

The Hincks timely appealed the final judgment of the Court of Federal Claims dismissing their action; we have jurisdiction to hear this appeal pursuant to 28 U.S.C. §1295(a)(3).

DISCUSSION

"A decision of the Court of Federal Claims 'to dismiss a complaint for lack of jurisdiction is a question of law subject to ... independent review by this court.' " Texas State Bank v. United States , 423 F.3d 1370, 1375 (Fed.Cir.2005) (quoting Shearin v. United States, 992 F.2d 1195, 1195 (Fed.Cir.1993)).

Whether the Court of Federal Claims has jurisdiction over §6404(e)(1) interest abatement decisions is one of first impression in our court. However, several other circuit and district courts have previously considered the same issue, both before the enactment of §6404(h) in 1996 and subsequent to its enactment. That case law, although not binding on us, is relevant to our analysis, and thus we begin by discussing that authority.

Prior to 1996, several courts had held that district courts had subject matter jurisdiction over §6404(e)(1) claims, but that the Administrative Procedure Act ("APA") barred judicial review of those claims. Argabright v. United States, 35 F.3d 472 (9th Cir.1994); Selman v. United States, 941 F.2d 1060 (10th Cir.1991); Horton Homes, Inc. v. United States, 936 F.2d 548 (11th Cir.1991). In Horton Homes, the Eleventh Circuit held that the district court had subject matter jurisdiction over the taxpayers' interest abatement claim because 28 U.S.C. §1346 states that the "district court shall have original ... of [a]ny civil action against the United States for the recovery of internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws"; the court held that the reference in the statute to "tax" included interest imposed on such tax. 936 F.2d at 550. The court also held, however, that the taxpayers' claim was not subject to judicial review because §6404(e)(1) left the interest abatement decision to the Secretary, and the APA specifies that decisions committed to agency discretion by law were not reviewable. Id. at 554.

In Selman, the Tenth Circuit reached the same result through a different interpretation of 28 U.S.C. §1346, reasoning that the taxpayers' §6404(e)(1) claim fell "within the district court's jurisdiction to decide cases regarding

'any sum alleged to have been excessive ... under the internal revenue laws" ' because "any sum" may refer to amounts which are neither taxes nor penalties, and one obvious example of such a "sum" was interest. 941 F.2d at 1062 (citing Flora v. United States, 362 U.S. 145, 149, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960)). The court determined that although it had subject matter jurisdiction to hear a suit for refund of interest under 28 U.S.C. §1346, judicial review of abatement decisions was precluded because Congress meant to commit abatement determinations under §6404(e)(1) to the Secretary's sole discretion. Id. at 1064. The court observed that the language in §6404(e)(1) was permissive and discretionary, stating that the Secretary "may" abate interest, whereas in subsection (e)(2), Congress directed that the Secretary "shall" abate the assessment of all interest on any erroneous refund under §6602. Id. In addition, the court noted that the legislative history of §6404(e)(1) explained that §6494(e)(1) "gives the IRS authority to abate interest but does not mandate that it do so." Id.

Finally, in Argabright, the Ninth Circuit held that district courts had subject matter jurisdiction over interest abatement claims, and relied on Horton Homes and Selman as persuasive authority to hold that the APA proscribed judicial review of the taxpayers' claim. 35 F.3d at 475-76.

Thus, prior to the enactment of §6404(h) in 1996, at least three circuits were in agreement that, while district courts had subject matter jurisdiction over §6404(e) claims, those claims were not subject to judicial review under the APA. Subsequent to the 1996 amendment, however, courts considering that same issue have not been in agreement. On the one hand, several district courts have held that Congress's grant of jurisdiction to the Tax Court to review interest abatement claims in §6404(h) was exclusive and thus withdrew jurisdiction from all other courts. Ballhaus v. Internal Revenue Serv. ____, 341 F.Supp.2d 1145

(D.Nev.2005); Kraemer v. United States , No. CIV. H-00-2948, 2002 WL 575791 (S.D.Tex. Feb.13, 2002); Dogwood Forest Rest Home, Inc. v. United States , 181 F.Supp.2d 554 (M.D.N.C.2001); Davies v. United States, 124 F.Supp.2d 717 (D.Me.2000); Henderson v. United States, 95 F.Supp.2d 995 (E.D.Wis.2000). As the district court noted in Ballhaus , those "holdings rested on congressional intent as construed by the legislative record, which indicated that Congress was well-aware of the case law constraining the federal courts' ability to review the Secretary's decisions, and had intended not to disturb the Argabright line of cases holding that district court review was unavailable." 341 F.Supp.2d at 1148.

On the other hand, the Fifth Circuit concluded in Beall v. United States, 336 F.3d 419 (5th Cir.2003), that district courts did have subject matter jurisdiction to review §6404(e)(1) appeals and that the APA did not bar review of those claims. Accord Leiter v. United States , No. Civ.A. 03-2149-GTV, 2004 WL 303210, at *8 (D.Kan. Jan.22, 2004) ("After reviewing the prior cases deciding this issue, as well as the relevant legislative history, the court is persuaded by the 5th Circuit's rationale in Beall. Accordingly, the court concludes that it has jurisdiction to review the IRS's denial of Plaintiff's request to abate interest.").

According to the Fifth Circuit, the purpose of amending §6404 in 1996 was to remove any impediment to district court review of interest abatement claims, and "Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion." Beall, 336 F.3d at 426, 429. The court reasoned that the fact that the Tax Court had jurisdiction to review interest abatement challenges means that the abatement decision was "no longer committed solely to agency discretion," and thus that the APA did not preclude judicial review of those claims. Id. at 426-27. The court also held that Congress's enactment of §6404(h) did not repeal the

district court's existing subject matter jurisdiction because the legislative history stated that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest" and repeals by implications are disfavored. Id. (quoting H.R.Rep. No. 104-105, at 28 (1996)).

In addition, the court expressed concern that denying the district court jurisdiction to hear claims under §6404(e)(1) would result in two anomalies: first, only certain taxpayers who met the net worth requirements found in §6404(h) would be able to seek judicial review of the IRS's failure to abate interest, and second, denying district courts power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Id. at 430. The court thus concluded that the grant of jurisdiction to the Tax Court in §6404(h) over interest abatement claims was not meant to preclude the district courts' exercise of jurisdiction over those same claims. Id.

On appeal, the Hincks argue that the Court of Federal Claims had jurisdiction over their interest abatement claim under both the Tucker Act, 28 U.S.C. §1491,[3] and 28 U.S.C. §1346(a)(1).[4] Because jurisdiction is presumed from the Tucker Act and 28 U.S.C. §1346(a)(1), the Hincks assert that pre-1996 cases dismissing interest abatement claims in the district courts for lack of jurisdiction under the APA

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[3] 28 U.S.C. §1491(a) provides the Court of Federal Claims with jurisdiction over claims "founded either upon the Constitution or any Act of Congress or any regulation of an executive department."

[4] 28 U.S.C. §1346(a)(1) provides the federal district courts, "concurrent" with the Court of Federal Claims, with jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected ... or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws."

were erroneously decided. The Hincks also assert that even if those cases were correctly decided, their holdings were abrogated by the 1996 Taxpayer Bill of Rights 2, which provided a judicially manageable standard for reviewing §6404(e)(1) claims. In addition, the Hincks argue that the statute does not create an exclusive grant of jurisdiction to the Tax Court, pointing out that the tax system generally grants jurisdiction to the Court of Federal Claims and district courts over post-payment tax refund actions, such as §6404(e)(1) claims. The Hincks contend that Congress would have expressly mandated exclusive jurisdiction in the statute if it had intended to do so; they assert that an interpretation of the statute contrary to their position would frustrate the intent of the Taxpayer Bill of Rights 2 to "provide for increased protections of taxpayer rights."

The government responds that the Court of Federal Claims correctly determined that it derives its jurisdiction over interest abatement claims from the Tucker Act. However, the government asserts that the Court of Federal Claims may not review the IRS's denial of interest abatements because §6404(h) consigns review of the IRS's determinations exclusively to the Tax Court. The government also contends that interest abatement decisions are not reviewable in the Court of Federal Claims because there are no relevant factors or justiciable standards for determining when the IRS must abate interest. Finally, the government argues that because the version of §6404(e)(1) at issue is virtually identical to the original version, the analysis of that provision in pre-1996 cases remains valid.

Our decision turns on the issue of subject matter jurisdiction: whether §6404(h)'s grant of jurisdiction to the Tax Court is exclusive or whether the Court of Federal Claims has concurrent jurisdiction to review interest abatement claims. It is well established that, without subject matter jurisdiction, the Court of Federal Claims, or any court, lacks power to determine the case before it.

United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). "A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." Rocovich v. United States, 933 F.2d 991, 993 (Fed.Cir.1991). The subject matter jurisdiction of the Court of Federal Claims is limited. *See* 28 U.S.C. §§1491-1509. We are also mindful of "the black letter law that the United States as a sovereign may not be sued unless it consents." Flexfab, L.L.C. v. United States , 424 F.3d 1254, 1263 (Fed.Cir.2005) (citing United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882)). "We thus are careful not to open the courthouse doors to those falling victim to the statements of unauthorized government agents, lest we broaden improperly the government's waiver of immunity from suit in these cases." Id. at 1264 (citing Chancellor Manor v. United States , 331 F.3d 891, 898 (Fed.Cir.2003) ("Waivers of sovereign immunity are construed narrowly.")).

Here, we agree with the government that §6404(h) grants the Tax Court exclusive jurisdiction over interest abatement claims, and that the Court of Federal Claims thus does not have subject matter jurisdiction to review those claims. When interpreting a statute, we look first to the language of the statute. United States v. Wells, 519 U.S. 482, 490, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). Section 6404(h) grants jurisdiction to a particular court, the Tax Court, to review IRS denials of interest abatements, and also specifies a particular standard, abuse of discretion, to be applied by that court: the "Tax Court shall have jurisdiction ... to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion." Section 6404(h) also grants the Tax Court the power to issue a remedy: "[t]he Tax Court ... may order an abatement, if [an interest abatement] action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest."

Because §6404(h) provides a specific procedure for reviewing IRS determinations of interest abatement, specifies that the proper forum for those reviews is the Tax Court, and grants the Tax Court the power to issue an abatement, we conclude that Congress intended the Tax Court to be the sole forum in which denials of interest abatement claims may be challenged.

Our view is confirmed by Supreme Court decisions holding that where "Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411, 420, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965) (citing Callanan Road Improvement Co. v. United States, 345 U.S. 507, 73 S.Ct. 803, 97 L.Ed. 1206 (1953); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907)).

In Whitney National Bank, the statute at issue was the Bank Holding Company Act of 1956, which prohibited a bank holding company from acquiring ownership or control of a national bank, new or existing, without the approval of the Federal Reserve Board. The Act provided for a full administrative proceeding before the Board in which all interested persons could participate and the views of the interested supervisory authorities could be obtained, and judicial review of that proceeding by specific courts of appeals. Id. at 417, 85 S.Ct. 551. The Supreme Court held that the statutory review procedures found in the Bank Holding Company Act of 1956 were "the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." Id. at 419, 85 S.Ct. 551. The Court reasoned,

> Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.

Id. at 420, 85 S.Ct. 551.

The same reasoning applies here. Even though the Tax Court is not an agency, it is a specialized court with expertise in tax matters. Congress only expressed its intent in §6404(h) that the Tax Court review the merits of interest abatement claims and order remedies as appropriate. In this context, permitting the Court of Federal Claims to make a concurrent determination as to the propriety of a denial of interest abatement "would substantially decrease the effectiveness of the statutory design." Id.

Further, the legislative history confirms that Congress intended the Tax Court to have exclusive subject matter jurisdiction over abatement decisions under §6404(e)(1). The House Report accompanying the Taxpayer Bill of Rights 2 states:

> Present law
>
> Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.
>
> Reasons for change
>
> The Committee believes that it is appropriate for the Tax Court to have jurisdiction to abate interest with respect to certain taxpayers.

Explanation of provision

> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

H.R.Rep. No. 104-506, at 28 (1996). Clearly, in 1996, Congress recognized that the courts generally do not have jurisdiction over interest abatement claims. However, Congress did not then grant jurisdiction to district courts and the Court of Federal Claims. Rather, the language of §6404 vests jurisdiction specifically in the Tax Court. As a House Report accompanying the pending Taxpayer Bill of Rights 2000 states:

> The Taxpayer Bill of Rights 2 specifically granted jurisdiction to the Tax Court to review for abuse of discretion any decision by the IRS not to abate interest that is attributable to unreasonable error or delay be Service employees in the performance of a ministerial or managerial act, effective for requests for abatement filed after July 30, 1996. Otherwise review of the Secretary's failure to use his or her discretion may not be available. The courts have held that judicial review of the IRS' failure to use its discretion to abate interest is generally not available, unless jurisdiction is specifically granted by statute or a standard has been established.

H.R.Rep. No. 106-566, at 32 (2000) (emphasis added) (footnotes omitted). Based on the specific statutory mandate, we therefore conclude that Congress intended to grant the Tax Court exclusive jurisdiction over interest abatement claims, and thus withdrew subject matter jurisdiction from all other courts over those claims.

Our interpretation of §6404(h) is consistent with various district court decisions that have also concluded that the Tax Court has exclusive subject matter jurisdiction over the IRS's denials of interest abatement. Ballhaus, 341 F.Supp.2d at 1151 ("[T]his Court determines that it does not have subject matter jurisdiction to hear the Plaintiff's claim for abatement of the interest assessed against him by the IRS. The 1996 amendment's express grant of jurisdiction to the tax court to hear disputes regarding interest abatements created exclusive jurisdiction in the tax court at the fact-finding stage of litigation.")Kraemer, 2002 WL 575791, at *6 ("Congress first acknowledged the district courts' powerlessness to review abatement decisions and then granted the Tax Court, alone, that jurisdictional power. This is the only plausible reading of 26 U.S.C. §6404[h]."); Dogwood Forest Rest Home, Inc., 181 F.Supp.2d at 558 ("[T]he review of the IRS's determination not to abate interest is properly within the jurisdiction of the Tax Court and not within the subject matter jurisdiction of this court."); Davies, 124 F.Supp.2d at 720 ("Congress, in enacting section [6404(h)], was well aware of, and intended to leave undisturbed, the Argabright line of cases-i.e ., that it expected that federal district courts would not undertake [review of interest abatement claims]."); Henderson, 95 F.Supp.2d at 1004 (E.D.Wis.2000) ("[T]his Court lacks jurisdiction over plaintiffs' request for interest abatement under section 6404(e) as section 6404(i) [which became 6404(h)] grants jurisdiction specifically to the Tax Court.").

Finally, as we have noted, the Fifth Circuit has rendered a contrary decision in Beall, holding that "in enacting section 6404(h), Congress ... removed any impediment to district court review of section 6404(e)(1) claims." 336 F.3d at 428. According to the Fifth Circuit, finding exclusive jurisdiction in the Tax Court would result in two anomalies: first, only certain taxpayers who meet the net worth requirements found in §6404(h) would be able to seek judicial review of the IRS's failure to abate interest, and second, denying district courts power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Id. at 430. Respectfully, neither concern persuades us to construe differently a statute that is clear on its face.

First, the legislative history makes clear that Congress was aware that only certain taxpayers could seek relief under §6404(h). See H.R.Rep. No. 104-506 at 28 (1996) ("The Committee believes it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers .") (emphasis added). To the extent that the statute provides no recourse for taxpayers who exceed the net worth criteria in §7430, that result was contemplated by Congress. We cannot rewrite the statute to reach a different outcome. Allowing individuals who exceed the net worth requirement of §7430 to bring a refund suit in other courts would undermine Congress's clear intent to limit the right to recover to those satisfying a net worth limitation. We note that in the Equal Access to Justice Act, 28 U.S.C. §2412(d), Congress provided that recovery of attorney fees incurred in litigating against the government is limited to parties "whose net worth did not exceed $2,000,000 at the time the civil action was filed." A similar limitation was imposed here.

Second, Congress recognized that district courts had jurisdiction over tax refund claims, but not interest

abatement claims, and specifically granted the Tax Court jurisdiction over the latter in particular circumstances involving certain taxpayers. That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear.

Based on the language and legislative history of the statute, we thus conclude that §6404(h) grants exclusive subject matter jurisdiction to the Tax Court to review the IRS's denials of interest abatement. Because the Court of Federal Claims lacked subject matter jurisdiction over the Hincks' interest abatement claim, we do not address justiciability. In addition, we have considered the Hincks' remaining arguments and find them unpersuasive or unnecessary for our decision.

CONCLUSION

Because the Court of Federal Claims lacked subject matter jurisdiction over the Hincks' interest abatement claim, the decision of that court is

AFFIRMED.

Revised July 14, 2003

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-41471

RAYMOND W. BEALL; HAZEL A. BEALL,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court

for the Eastern District of Texas.

Before GARWOOD, JONES and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants Raymond W. Beall and Hazel A. Beall (the Bealls) appeal the dismissal, for want of subject matter jurisdiction, of their claim for a refund of the interest on income taxes paid to the defendant-appellee, the United States. Because we conclude, for the reasons set forth below, that the district court did possess jurisdiction to hear the Bealls' complaint, we reverse the judgment of the district court and remand.

Background

On March 31, 1997, the Bealls entered into a settlement agreement with the Internal Revenue Service (IRS) to resolve certain tax deficiencies arising from the Bealls' 1984 tax return and subsequent claim for refund. [1] Following that settlement, the IRS assessed additional income taxes, as well as interest on those taxes, against the Bealls. After satisfying their outstanding tax liability, the Bealls, on December 22, 1997, filed a claim for refund of the tax and interest charged against them.

The IRS denied the Bealls' claim for refund, and on April 22, 1999, the Bealls filed a supplemental claim for refund in which they claimed both that the interest on their assessed tax liability should have been netted against other years under 26 U.S.C. §6221(d), and that a portion of that interest should have been abated under 26 U.S.C. §6404(e)(1). Based on those refund claims, the Bealls then commenced the present suit in federal district court on March 28, 2000.

The district court granted the Government's motion to dismiss, concluding, among other things, that it lacked subject matter jurisdiction to hear a challenge to the denial of a request for interest abatement under section 6404(e)(1)

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[1] The Bealls' tax dispute with the IRS centered around Raymond Beall's investment, in the early 1980s, in two agricultural partnerships. Based on losses reported by those partnerships, the Bealls claimed a tax loss for 1984 of $208,353, and filed an application for a tax refund in 1985 on which they carried back a portion of losses incurred by the partnerships from 1981 to 1984. The IRS eventually examined the partnerships' 1984 returns, and in 1991, issued proposed adjustments to the partnerships' income tax returns. It is the Bealls' income-tax liability resulting from those adjustments that formed the basis of the present dispute.

of the Internal Revenue Code.[2] The Bealls now appeal the dismissal only of that part of their claim for refund based on 26 U.S.C. §6404(e)(1).

Discussion

"We review a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction *de novo,* using the same standards as those employed by the lower court." *John Corp. v. City of Houston,* 214 F.3d 573, 576 (5th Cir.2000); *Rodriguez v. Texas Comm'n on the Arts,* 199 F.3d 279, 280 (5th Cir.2000). We accept as true the Bealls' uncontroverted factual allegations, "and will affirm the dismissal if 'the court lacks the statutory or constitutional power to adjudicate the case.' " *Id.* (quoting *Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1187 (2d Cir.1996)).

A. *Sovereign Immunity*

As a threshold matter, we first address the Government's position that Congress has not waived sovereign immunity so as to permit a plaintiff to sue in federal district court for a refund of unabated interest. *See F.D.I.C. v. Meyer,* 114 S.Ct. 996, 1000 (1994) ("Sovereign immunity is jurisdictional in nature.... Therefore, we must first decide whether ... immunity has been waived."). Without such a waiver, there can be no jurisdiction over the Bealls' refund claim in either the district court or in this court. *Id.; United States v. Mottaz,* 106 S.Ct. 2224, 2229 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent

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[2] The district court also dismissed, for want of subject matter jurisdiction, the Bealls §6221(d) interest-netting claim. The court had previously dismissed, as untimely, that portion of the Bealls' complaint that relied on their December 12, 1997, claim for a refund. The Bealls did not appeal either of these rulings, and they are not, therefore, now before us.

of the court's jurisdiction."); *Moore v. Dept. of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d 991, 993 (5th Cir.1995).

The Bealls premised subject matter jurisdiction in the district court upon 28 U.S.C. §1346. Section 1346(a)(1) provides for original jurisdiction in the district courts over claims "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. §1346. We have stated, however, that section 1346, standing alone, is insufficient to waive sovereign immunity. "Section 1346 is a general jurisdiction statute that does not constitute a separate waiver of sovereign immunity." *Shanbaum v. United States*, 32 F.3d 180, 182 (5th Cir.1994).

The Bealls' complaint, however, references, among other provisions, section 7422 of the Internal Revenue Code. In language that mirrors section 1346, section 7422 provides for a civil action for refund of certain wrongfully collected taxes.[3] And although section 1346 does not waive sovereign immunity by itself, when coupled with a claim brought under section 7422, section 1346 does provide the necessary waiver of immunity. *See United States v. Michel*, 51 S.Ct.

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[3] Section 7422 provides for the recovery of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. §7422(a).

Section 7422's reference to "any internal revenue tax" also encompasses interest assessed on an owed tax. *See* 26 U.S.C. §6601(e)(1) (providing that "[a]ny reference" in the Internal Revenue Code "to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax").

284, 285 (1931); *Shanbaum,* 32 F.3d at 182 ("Section 1346 operates in conjunction with 26 U.S.C. §7422 to provide a waiver of sovereign immunity in tax refund suits ... when the taxpayer has fully paid the tax and filed an administrative claim for a refund.").

The Bealls have fully paid the tax and interest at issue, and have filed a claim for a refund with the IRS. If their claim for a refund of unabated interest under 26 U.S.C. §6404(e)(1), therefore, is cognizable under section 7422, then sovereign immunity presents no bar to the exercise of subject matter jurisdiction.

The Government's claim of immunity thus requires us to address the compass of section 7422 with an eye to determining whether it can accommodate the Bealls' interest abatement claim. According to the Government it cannot, and a claim for abatement of interest, therefore, cannot be brought as a claim for a refund under section 7422. The language of the statute, however, is not susceptible to so limited a construction, and we decline to give it such.

Section 7422 permits a claim for a refund not only for "erroneously or illegally assessed" taxes, but also for "any sum alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. §7422. Whether the Bealls' abatement claim is cognizable under section 7422, thus requires the resolution of two questions: (1) whether the phrase "any sum," includes unabated interest charged on income taxes owed; and if so, (2) whether the phrase "excessive or ... wrongfully collected" includes a sum of interest that the IRS has refused to abate in accordance with 26 U.S.C. §6404.[4] [FN4] We answer both questions in

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[4] Section 6404, as amended by the Taxpayer Bill of Rights II, *see* Pub. L. No. 104-168, §301(a), 110 Stat. 1452 (1996), permits the Secretary of the Treasury to abate interest charged against a taxpayer, and provides

the affirmative, and conclude, therefore, that a claim for a refund of unabated interest is cognizable under section 7422 and is not barred by sovereign immunity.

The Supreme Court has long since indicated that the phrase "any sum" likely encompasses a claim for interest. Thus in construing identical language in section 1346, the Court noted that " 'any sum,' instead of being related to 'any internal-revenue tax' and 'any penalty,' may refer to amounts which are neither taxes nor penalties," and that "[o]ne obvious example of such a 'sum' is interest." *See Flora v. United States,* 80 S.Ct. 630, 633 (1960).

A claim for abatement of interest, however, differs from the prototypical claim for refund of taxes and interest under section 7422. The archetypal refund claim is a claim that the taxpayer never owed the underlying tax. *See United States v. Williams,* 115 S.Ct. 1611, 1616 (1995) (noting that section 1346(a)(1) displaced the common-law remedy of assumpsit for money had and received, a remedy that afforded relief to taxpayers who "had paid money they did not owe–typically as a result of fraud, duress, or mistake"); *see, e.g., Your Insurance Needs Agency, Inc. v. United States,* 274 F.3d 1001 (5th Cir.2001) (addressing a refund claim for tax overpayments). A claim for the refund of interest that the taxpayer argues should have been abated, on the other

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in relevant part

> "(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–
>
> (1) In general.–In the case of any assessment of interest on–
>
> (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official city) in performing a ministerial or managerial act, or ... The Secretary may abate the assessment of all or any part of such interest for any period." 26 U.S.C. §6404(e)(1) (2002).

hand, is not a claim to recover money that was paid but never owed, but is a claim that interest, otherwise legitimately assessed, could have been less had the IRS not unreasonably delayed in the performance of a ministerial or managerial task. *See* 26 U.S.C. §6404(e)(1).

That a claim for abatement of interest is not identical to an action in assumpsit or a refund claim challenging the validity of the underlying tax, however, does not necessarily establish that an abatement claim cannot be prosecuted under section 7422. Section 7422 is a statutory remedy, and is not confined to the limits of its common-law ancestor. *See, e.g., Flora,* 80 S.Ct. at 635 (noting that since 1862, an action for refund ceased to be regarded as a common-law action, "but rather as a statutory remedy which 'in its nature [was] a remedy against the Government' ") (quoting *Curtis's Adm'x v. Fiedler,* 67 U.S. (2 Black) 461, 479 (1862)). It is the language of section 7422 that must control, language that in referring broadly to "any sum," would by its terms appear to accommodate a claim for the abatement of interest.

Finally, we note that our decision in *Poretto v. Usry,* 295 F.2d 499 (5th Cir.1961), supports the conclusion that section 7422 may accommodate a claim for the refund of unabated interest. In *Poretto,* a taxpayer who had been penalized for failing to withhold excise taxes on behalf of his customers, brought an action, citing section 6404, for the abatement of assessed taxes and penalties. *Id.* at 499. Although we affirmed the dismissal of the taxpayer's action for equitable relief, we noted that the taxpayer's appropriate course of action would have been to pay the taxes and penalties, and then to challenge the tax through the normal "pay and sue" provisions of section 7422. *Id.* at 501-02. We read *Poretto,* therefore, as supporting the proposition that a cause of action under section 7422 encompasses a claim for abatement of interest under section 6404(e)(1). *See also Magnone v. United States,* 733

F.Supp. 613 (S.D.N.Y.1989) (indicating that a claim under 6404(e)(1) could have proceeded as a claim for a refund under section 7422, had the plaintiffs complied with the payment requirements of that section). Accordingly, we decline to restrict section 7422 as the Government suggests, and instead find that the phrase "any sum," thus unmoored from its common-law origins, is copious enough to encompass a claim for refund of unabated interest.

Having answered the first question–whether the phrase "any sum" includes unabated interest charged on income taxes owed–in the affirmative, we now turn to the second, and conclude that the phrase "excessive or ... wrongfully collected" includes interest charges that the IRS abused its discretion in refusing to abate pursuant to 26 U.S.C. §6404(e)(1).

As we did above, in interpreting a statute, we look first to its plain language. *See Moore v. Cain,* 298 F.3d 361, 366 (5th Cir.2002). Excessive is defined as "exceeding the usual, *proper,* or normal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 792 (1961) (emphasis added). *See also* 5 OXFORD ENGLISH DICTIONARY 501 (2d ed. 1999) ("Exceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant."). [5] The question thus becomes whether the denial of a request for abatement of interest, where that denial amounts to an abuse of discretion, is either not proper, or results in the collection of a sum of interest that so exceeds the usual or normal as to be considered excessive.

An abuse of discretion necessarily occurs where an act can only be described as clearly improper. *See, e.g., United*

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[5] The Supreme Court has applied an identical definition of the term "excessive" in the context of the Excessive Fines Clause. *See United States v. Bajakajian,* 118 S.Ct. 2028, 2036-2037 (1998) ("Excessive means surpassing the usual, the proper, or a normal measure of proportion.").

States v. O'Neil, 709 F.2d 361, 372 n. 11 (5th Cir.1983) (equating an improper decision with an abuse of discretion). Thus, where a refusal to abate interest amounts to an abuse of discretion, we may conclude that that refusal is improper, and the improperly unabated interest therefore excessive. In other words, any time that the Secretary should commit an abuse of discretion in denying a request for an abatement, the Secretary has assessed an improper, and therefore an excessive sum. Thus we also answer in the affirmative our second question–whether the phrase "excessive or ... wrongfully collected" includes a sum of interest that the IRS has improperly refused to abate in accordance with 26 U.S.C. §6404.

Having determined that the phrase "any sum" includes a sum of unabated interest, and that the phrase "excessive ... or wrongfully collected" includes the denial of a request for abatement where that denial amounts to an abuse of discretion, we conclude that an interest abatement claim is cognizable under section 7422, and that sovereign immunity over such claim is waived by operation of sections 7422 and 1346. We therefore join our sister circuits in holding that a "taxpayer['s] cause of action, alleging that [he] paid excessive interest charges because the IRS abused its discretion in refusing to abate interest pursuant to I.R.C. §6404(e)(1), falls within the district court's jurisdiction to decide cases regarding 'any sum alleged to have been excessive ... under the internal-revenue laws.' " *Selman v. United States,* 941 F.2d 1060, 1062 (10th Cir.1991); *accord Argabright v. United States,* 35 F.3d 472 (9th Cir.1994) (declining to review an interest abatement claim, but exercising subject matter jurisdiction over that claim); *Horton Homes, Inc. v. United States,* 936 F.2d 548, 550 (11th Cir.1991) (same).

B. *Review of Section 6404(e)(1) Denials*

That the district court possessed the power to hear the Bealls' claim, however, merely begins our inquiry; it does not establish whether the denial of the Bealls' request for abatement of interest is subject to judicial review.

Under the Administrative Procedure Act (APA), final agency decisions are generally susceptible to judicial review. Section 701(a) of the APA, however, proscribes review in two narrow situations, namely where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(1), (2). Based on these limitations, each circuit to address the issue prior to 1996 determined that the decision to grant an abatement under section 6404(e)(1) was not subject to judicial review. *See Argabright,* 35 F.3d at 476; *Selman,* 941 F.2d at 1064; *Horton Homes,* 936 F.2d at 554.

Proceeding from section 701 of the APA, those circuits concluded that the permissive language of section 6404(e)(1), as well as the absence in that section of any substantive standards by which a court might review an agency action, precluded judicial review. *See Argabright,* 35 F.3d at 475-476 (citing *Horton Homes* and *Selman*). In further support of this position, each circuit also examined the legislative history of section 6404, noting the absence of any substantive standards for review in the legislative history, as well as language in the House and Senate reports noting that section 6404(e)(1) "gives the IRS the authority to abate interest but does not mandate that it do so." *Id.* at 476. Accordingly, all three ultimately agreed that "the language, structure and legislative history of I.R.C. §6404(e)(1) indicate[d] that Congress meant to commit the abatement of interest to the Secretary's discretion," and

that section 701(a)(2) barred judicial review. *Selman,* 941 F.2d at 1064.[6]

Congress, however, has since amended section 6404. As part of the passage in 1996 of the Taxpayer Bill of Rights II, *see* Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.), Congress approved a number of amendments to section 6404 that are relevant to our analysis of the present case. First, with respect to section 6404(e)(1), Congress added "unreasonable" to modify the words "error or delay," and added "or managerial act," where before only "ministerial act" had appeared. *See id.* at §301(a)(2). The current version of section 6404(e)(1), therefore, now provides:

> "(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–
>
> (1) In general.–In the case of any assessment of interest on–
>
> > (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, ...
>
> The Secretary may abate the assessment of all or any part of such interest for any period." 26 U.S.C. §6404(e)(1) (2002).

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[6] Of the three opinions, only one, *Horton Homes,* concluded that review of the abatement decision was prohibited by §701(a)(1) as well as §701(a)(2). *See Horton Homes,* 936 F.2d at 551-552. The *Selman* court found that the language of §6404(e)(1) did not expressly preclude judicial review, *see Selman,* 941 F.2d at 1063, and the *Argabright* court, having found review precluded by §701(a)(2), did not address the applicability of §701(a)(1).

Second, Congress provided for review in the Tax Court of the Secretary's decision to deny a request for the abatement of interest. *See* Pub. L. No. 104-168, §302, 110 Stat. 1457-1458 (1996). Thus, the current section 6404(h)[7] provides, in part, that

> "The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest." 26 U.S.C. §6404(h).

The statutory landscape in which we address the Bealls' claim for interest abatement is thus substantially different from the one facing the *Horton Homes, Selman* , and *Argabright* courts. And though, were we to address today the same issue that faced those courts, we would most likely, and for the same reasons, conclude that judicial review of the Secretary's decision to deny an abatement request is barred, our decision now must be guided instead by the above 1996 amendments.[8] We cannot merely adopt

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[7] Section 6404(h) has not been substantively amended since its passage in 1996. Its designation, however, has changed twice. The current §6404(h) was initially designated §6404(g). It was redesignated 6404(i) by the IRS Restructuring and Reform Act of 1998. Thus, from 1998 until 2002, it appeared in the United States Code as 26 U.S.C. §6404(i). In 2002, Public Law Number 107-134, §112(d)(1) repealed the former subsection (h) and designated then subsection 6404(i) as subsection (h), the designation it currently holds.

[8] The Bealls attack, in a number of places in their brief, the soundness of the decisions in *Horton Homes*, *Selman*, and *Argabright* that the denial of a request for abatement before 1996 was, in fact, wholly discretionary and unreviewable. This question, however, is now not before us.

the reasoning of the *Horton Homes* line of cases, but must construe, as a matter of first impression, the effect of the 1996 changes to section 6404.

Having reviewed those changes, we find that in amending section 6404, Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion. *See Miller v. Commissioner of Internal Revenue,* 310 F.3d 640, 643 (9th Cir.2002) (recognizing that " *Argabright* 's holding that judicial review is not available for IRS decisions pursuant to §6404(e)(1) ... has been undermined by subsequent legislation and, to that extent, is no longer good law."). We need look no further for support for this conclusion than the simple addition of section 6404(h) granting jurisdiction to the Tax Court to review that decision. Indeed, the vesting of jurisdiction in the Tax Court to review interest abatement challenges can be given no meaning other than that the abatement decision is no longer committed solely to agency discretion. Accordingly, we cannot say that either section 701(a)(2) of the APA, or the absence of manageable standards of review generally, any longer precludes judicial

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Moreover, that issue apparently was resolved contrary to the Bealls' position by our unpublished opinion in *Maloney v. United States,* 95-2 U.S.T.C. ¶50,441 (No. 94-30609, 5th Cir. July 13, 1995), in which we affirmed without statement of reasons the district court's unpublished decision in *Maloney v. United States,* 94-2 U.S.T.C. ¶ 50,484 (civil No. 94-0602, E.D.La. Sept. 6, 1994). Although our opinion there does not so reflect, the district court's opinion in *Maloney* relied on *Horton Homes* and *Selman* and held "the Court is without authority to review plaintiff's claim that the IRS should have abated the assessment of interest under 26 U.S.C. §6404(e)(1)." Unpublished opinions issued before January 1, 1996, are precedent. Fifth Cir. Rule 47.5.3.

review of the denial of a request for the abatement of interest.[9]

C. *Exclusive Jurisdiction in the Tax Court*

Having concluded that the decision to abate interest no longer rests entirely with the Secretary, the question remains whether review of that decision is limited to the Tax Court, or whether review is also available in federal district court. Thus, although both parties concede, as they must, that review of the Secretary's decision is now available in the Tax Court, the Government maintains that the grant of jurisdiction in section 6404(h) to the Tax Court is exclusive, and that the district court is, therefore, without power to hear a claim under section 6404(e)(1). We do not agree.

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[9] Although we hold that Congress has indicated that the decision to abate interest is no longer committed entirely to agency discretion, and that judicial review of that decision is no longer barred by §701(a)(2) of the APA, because we also hold that a claim for a refund of unabated interest is cognizable under I.R.C. §7422, *see supra* Part II(A), we note that our discussion of §701(a)(2) should not be read as sanctioning the use of the APA as a vehicle for bringing a challenge to a decision of the Secretary under §6404(e)(1). "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts,* 108 S.Ct. 2722, 2736 (1988). And review under the APA is accordingly available only where "there is no other adequate remedy in a court." 5 U.S.C. §704; *see Poirier v. Commissioner,* 299 F.Supp. 465, 466 (E.D.La.1969) (denying relief under the APA where taxpayers had an adequate remedy under the I.R.C.); *see also Town of Sanford v. United States,* 140 F.3d 20, 23-24 (1st Cir.1998) (denying relief under the APA for the recovery of taxes lost when the United States obtained a forfeiture judgment against a local taxpayer where the plaintiff town had the available remedy of moving to reopen a forfeiture decree); *New York City Employees' Ret. Sys. v. Securities and Exchange Commission,* 45 F.3d 7, 14 (1995) (refusing to entertain a claim for relief under the APA where the plaintiffs had an available alternative remedy under Rule 14a-8).

Unlike our conclusion that the Secretary's abatement decision is no longer discretionary, determining whether Congress intended for the jurisdictional grant in section 6404(h) to be exclusive requires us to delve further into the legislative history of section 6404 than merely noting the simple fact of section 6404(h)'s enactment.

The House report accompanying the 1996 Taxpayer Bill of Rights indicates that Congress was aware of the *Horton Homes* line of cases. In describing the pre-1996 state of the law governing the review of interest abatement denials, the report notes that "[f]ederal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." *See* H.R. REP. NO. 104-506, at 28 (1996). From this statement, the Government argues that because Congress was aware that federal courts would not review the Secretary's decision under section 6404(e)(1), the decision to grant jurisdiction only to the Tax Court must mean that Congress chose not to extend jurisdiction to the district courts.[10]

There are, however, a number of problems with the Government's argument. First, it ignores the basis for the decisions in the *Horton Homes* line of cases. Those decisions denied review not because the district courts lacked subject

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[10] The Government is not alone in advancing this position. Rather, at least three district courts, in addition to the court below, have been persuaded by identical reasoning. *See Kraemer v. United States*, 89 A.F.T.R.2d 2002-1796 (S.D.Tex.2002) ("Congress first acknowledged the district courts' powerlessness to review abatement decisions and then granted the Tax Court, alone, that jurisdictional power. This is the only plausible reading of 26 U.S.C. §6404[h]."); *Davies v. United States*, 124 F.Supp.2d 717, 720 (D.Me.2000) ("Congress, in enacting section [6404(h)], was well aware of, and intended to leave undisturbed, the *Argabright* line of cases–*i.e.*, that it expected that federal district courts would not undertake [review of interest abatement claims]."); *Henderson v. United States*, 95 F.Supp.2d 995 (E.D.Wis.2000).

matter jurisdiction over the taxpayers' claims,[11] but because the then extant version of section 6404(e)(1) committed the decision to abate interest to agency discretion. *See Argabright,* 35 F.3d at 476; *Selman,* 941 F.2d at 1064; *Horton Homes,* 936 F.2d at 554. In other words, the federal district courts have always possessed *jurisdiction* over challenges brought to section 6404(e)(1) denials, they simply determined that the taxpayers had no *substantive right* whatever to a favorable exercise of the Secretary's discretion (at least absent unfavorable exercise on an unconstitutional basis, *Horton Homes* at 554). As we concluded above, however, in amending section 6404(e)(1) and in enacting section 6404(h), Congress indicated that such is no longer the case, and thereby removed any impediment to district court review of section 6404(e)(1) claims.

Not only did Congress remove the barrier to district court review recognized in the *Horton Homes* cases,[12] but Congress nowhere stated in the 1996 amendments that the district courts *did not* have jurisdiction to review interest abatement denials. On the contrary, the House committee report clearly states that "[n]o inference is intended as to

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[11] The Government's entire jurisdictional argument on this point, therefore, is constructed on a false premise, namely that the *Horton Homes, Selman,* and *Argabright* courts did not have subject matter jurisdiction over interest abatement claims. In so doing, the Government merely compounds the committee report's misuse of the term "jurisdiction." *See, e.g., Steel Co. v. Citizens for a Better Environment,* 118 S.Ct. 1003, 1010 (1998) (" 'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.' ") (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)).

[12] There can be no question but that the IRS's denial of a request for the abatement of interest is now reviewable. *See Taylor v. Commissioner,* 113 TC 206, 1999 WL 717825 (1999) (reviewing the denial of a request for an abatement); *Lee v. Commissioner,* 113 TC 145, 1999 WL 680250 (1999) (same). *See also Miller,* 310 F.3d at 643.

whether under present law any court has jurisdiction to review IRS's failure to abate interest." *See* H.R. REP. NO. 104-506, at 28 (1996).[13]

Viewed against a proper reading of the *Horton Homes* cases, therefore, the Government's argument essentially becomes a claim that Congress, in granting jurisdiction to the Tax Court to review interest abatement denials, impliedly repealed the district court's existing jurisdiction to review the same. Repeals by implication, however, are disfavored. *See Traynor v. Turnage,* 108 S.Ct. 1372, 1381 (1988); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996) ("It is hornbook law that 'repeals by implication are not favored.' ") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 107 S.Ct. 2494, 2497 (1987)). And there is nothing in the grant of jurisdiction to the Tax Court in section 6404(h) that would preclude review in federal district court. Moreover, as observed above, the House report clearly noted that Congress's grant of jurisdiction was not to be read as a statement regarding the existence *vel non* of jurisdiction in the district courts. [14] Indeed, rather than reading

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[13] The Government would have us read this language as an expression of Congress's intent to leave pre-1996 case law in effect. The more natural reading of the committee's statement, however, takes it simply at face value: that Congress intended to make no statement regarding the existence of jurisdiction in the district courts or the applicability under the new law of the *Horton Homes* line of cases. Moreover, if Congress did intend to leave pre-1996 case law in effect, such a reading would not advance, but would actually undermine the Government's position, *i.e.,* it would follow from the fact that the district courts did have *jurisdiction* over §6404 claims before 1996, that the district courts would continue to have jurisdiction over those claims after 1996.

[14] We realize that our conclusion that the Taxpayer Bill of Rights II was not intended to preclude the exercise of district court jurisdiction to hear abatement claims is undermined somewhat by certain material reprinted in the Congressional Record at the request of Senator Bryan, a co-sponsor of the bill in the Senate that ultimately became the Taxpayer Bill of

the grant of jurisdiction to the Tax Court as implying the absence of jurisdiction in the district court, the more natural interpretation of section 6404(h) is that Congress

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Rights II. That material includes the following explanation of §6404(h):

> "[Taxpayer Bill of Rights II] will provide that for qualified small taxpayers, as defined in section 7430(c)(4)(A)(ii), the Secretary must abate or refund interest when the IRS has made an unreasonable error or delay. This will allow courts to review the IRS determination on the abatement of interest issue for small taxpayers. For nonqualified 'larger' taxpayers, courts will still not be allowed to review the IRS determination on the interest abatement issue...." 141 CONG. REC. S1370-1371 (1995) (material appended to statement of Sen. Bryan).

This isolated statement, however, does not alter our conclusion that the 1996 amendments to §6404 do not deprive the district courts of jurisdiction to hear challenges to the IRS's failure to abate interest. First, Senator Bryan's statement is contradicted by remarks made on the same day by a fellow co-sponsor of the bill in the Senate. In the same portion of the Congressional Record, Senator Pryor noted that the Taxpayer Bill of Rights II will both "require the IRS to abate interest when it has made an unreasonable error or delay, and enable the *courts* the power to review the interest abatement determination." 141 CONG. REC. S1369 (1995) (statement of Sen. Pryor)(emphasis added). Second, the House report, *see supra* text accompanying note 14, which unlike Senator Bryan's 1995 statement was prepared in 1996 at the time the bill was enacted into law, expressly declined to make any statement regarding the availability of review of the abatement issue in the district court. *See* H.R. REP. NO. -506, at 28 (1996) (warning that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest."). And third, and most important, the language of §6404(h) nowhere indicates that district court review of the abatement issue is not available, nor is there any indication that the grant of jurisdiction to the Tax Court is in any way inconsistent with the availability of district court review.

simply chose to extend concurrent jurisdiction to the Tax Court over a certain class of claims.[15]

We also find persuasive the Bealls' argument that reading the grant of jurisdiction to the Tax Court as exclusive of jurisdiction in the federal district courts, would be inconsistent with the general structure of the Internal Revenue Code and the jurisdictional limitations of the Tax Court.

Though the federal district courts have jurisdiction generally over suits for the refund of taxes, *see* 28 U.S.C. §1346, that jurisdiction is available only where the taxpayer first pays the entire amount of the disputed tax. *See Flora v. United States,* 80 S.Ct. 630, 646-647 (1960). The Board of Tax Appeals, the predecessor of the Tax Court, on the other hand, was established by Congress to relieve taxpayers of the burdens of pre-payment and to permit them to obtain a determination of their tax liability *before* paying any deficiency. *Id.* at 637, 638.[16] Accordingly, the Tax Court, as a statutory court of limited jurisdiction, possesses "only such power to adjudicate controversies as is conferred upon it by the Internal Revenue Code." *Continental Equities, Inc. v. Commissioner,* 551 F.2d 74, 79 (5th Cir.1977). "It does not have the authority to order that a refund be given, or to review the Commissioner's denial of a refund claim." *Id.*

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[15] Section 6404(h) only grants the Tax Court jurisdiction over a limited class of claims. The claimant must bring an action within 180 days after the mailing of notice of the Secretary's decision not to abate interest, and the claimant must be an individual taxpayer whose net worth does not exceed $2,000,000 at the time the action is filed, or a business, corporation, or partnership of less than 500 employees, whose net worth does not exceed $7,000,000 at the time the action is filed. *See* 26 U.S.C. §§6404(h); §7430(c)(4)(A)(ii).

[16] The Board of Tax Appeals was thus a particular help to those "small" taxpayers who would be less likely to be able to make prepayment of their IRS determined tax liability.

And a specific grant of jurisdiction, such as section 6404(h), is thus necessary for the Tax Court to exercise any jurisdiction.

The same is not true of the district court's refund jurisdiction. Having removed the impediment to district court review identified in *Horton Homes* by indicating that the IRS's decisions on requested interest abatement were not merely matters of administrative grace and that denials were subject to *substantive* challenge, it was not necessary for Congress to provide for a specific grant of jurisdiction to hear abatement denials. To read a grant of jurisdiction to the Tax Court to hear an interest abatement claim, as exclusive would be to read too much into section 6404(h).

Finally, we note that to deny district court jurisdiction to hear claims under section 6404(e)(1) would result in two anomalies. First, only certain taxpayers, namely those who meet the net worth requirements found in section 6404(h), would be able to seek judicial review of the IRS's failure to abate interest. Those taxpayers whose net worth exceeds the limits found in section 6404(h), would be left entirely without recourse. Second, denying district courts the power to hear claims under section 6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Thus, a plaintiff who chose to pay his tax liability first and sue in district court under 28 U.S.C. §1346, would not be able to bring, at the same time, a challenge to the IRS's failure to abate interest already collected. Instead, that taxpayer would have to sever his interest abatement claim from his refund claim and pursue the abatement claim separately in the Tax Court. Such splitting of claims is generally considered undesirable, *see, e.g., In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996) (discussing rule against claim-splitting), and we cannot conclude, absent some indication to the contrary, that Congress would have intended such a result.

For these reasons, we cannot conclude that the grant of jurisdiction to the Tax Court in section 6404(h) was meant to preclude the exercise of district court jurisdiction over interest abatement claims.

D. *Ministerial or Managerial Act*

Finally, the Government argues that even if the district court erred in dismissing the Bealls' complaint for lack of subject matter jurisdiction, dismissal was nevertheless warranted as the interest at issue did not accrue as a result of any IRS error or delay in performing a ministerial act.

The district court, however, dismissed the Bealls' complaint without addressing this issue. And because we conclude that this issue is best addressed in the first instance in the district court, we decline to address it here.

Conclusion

After examining the legislative history of §6404(e)(1) and (h), we cannot conclude that Congress meant for the Tax Court's jurisdiction to hear section 6404(e)(1) claims to be exclusive. Nor can we conclude that sovereign immunity operates to bar relief in the district courts for a claim for the abatement of interest brought under section 7422.

For these reasons, we find that the district court did have jurisdiction to hear the Bealls' claim for interest abatement. We accordingly REVERSE the judgment of the district court, and REMAND for proceedings consistent with this opinion.

REVERSED and REMANDED

Internal Revenue Code (26 U.S.C.)

§6015(f) Relief From Joint And Several Liability On Joint Return

. . . .

(f) Equitable Relief.–Under procedures prescribed by the Secretary, if–

(1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either), and

(2) relief is not available to such individual under subsection (b) or (c),

the Secretary may relieve such individual of such liability.

§6110. Public Inspection Of Written Determinations

. . . .

(j) Civil Remedies.–

(1) Civil Action.–Whenever the Secretary–

. . . .

(B) fails to follow the procedures insubsection (g) or (i)(4)(B),

the recipient of the written determination or any person identified in the written determination shall have as an exclusive civil remedy an action against the Secretary in the United States Claims Court, which shall have jurisdiction to hear any action under this paragraph.

§6330. Notice And Opportunity For Hearing Before Levy

(d) Proceeding After Hearing.–

. . . .

(1) Judicial Review Of Determination.–The person may, within 30 days of a determination under this section, appeal such determination–

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter), or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

§6404. Abatements

. . . .

(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–

(1) In general.–In the case of any assessment of interest on–

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in §6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

. . . .

(h) Review of denial of request for abatement of interest.–

(1) In general.–The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in §7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion,

and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

(2) Special rules.–

(A) Date of mailing.–Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

(B) Relief.–Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

(C) Review.– An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

§6511. Limitations On Credit Or Refund

(a) Period of limitation on filing claim.– Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

§6512. Limitations In Case Of Petition To Tax Court

(b) Overpayment Determined By Tax Court.–

(1) Jurisdiction To Determine.– Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year, or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction To Enforce.–If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit On Amount Of Credit Or Refund.–No such credit or refund shall be allowed or made of any portion of

the tax unless the Tax Court determines as part of its decision that such portion was paid—

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency--

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

In the case of a credit or refund relating to an affected item (within the meaning of section 6231(a)(5)), the preceding sentence shall be applied by substituting the periods under sections 6229 and 6230(d) for the periods under section 6511(b)(2), (c), and (d).

In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.

(4) Denial Of Jurisdiction Regarding Certain Credits And Reductions.–The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

§7422. Civil actions for refund

(a) No suit prior to filing claim for refund.–No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

§7430. Awarding of costs and certain fees

. . . .

(c) Definitions.– For purposes of this section–

. . . .

(4) Prevailing party.–

(A) In general .–The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)–

. . . .

(ii) which meets the requirements of the 1st sentence of §2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of §2412(d)(2)(B) of such title 28 (as so in effect).

§7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

(Aug. 16, 1954, ch. 736, 68A Stat. 879.)

Judiciary and Judicial Procedure (28 U.S.C.)

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

[(3) Repealed. Pub.L. 104-320, § 12(a)(2), Oct. 19, 1996, 110 Stat. 3874]

§2412. Costs and fees

. . . .

(d)(1)(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . . .

(2) For the purposes of this subsection–

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in §501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under §501(a) of such Code, or a cooperative association as defined in §15(a) of the Agricultural

Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in §601 of Title 5.

Public Law 104-168, 110 Stat. 1452 (July 30, 1996)

TITLE III – ABATEMENT OF INTEREST AND PENALTIES

SEC. 301. EXPANSION OF AUTHORITY TO ABATE INTEREST.

(a) GENERAL RULE.–Paragraph (1) of section 6404(e) (relating to abatement of interest in certain cases) is amended–

(1) by inserting "unreasonable" before "error" each place it appears in subparagraphs (A) and (B), and

(2) by striking "in performing a ministerial act" each place it appears and inserting "in performing a ministerial or managerial act".

(b) CLERICAL AMENDMENT.–The subsection heading for subsection (e) of section 6404 is amended–

(1) by striking "A SSESSMENTS" and inserting "ABATEMENT",

and

(2) by inserting "UNREASONABLE" before "ERRORS".

(c) EFFECTIVE DATE.–The amendments made by this section shall apply to interest accruing with respect to deficiencies or payments for taxable years beginning after the date of the enactment of this Act.

H.R. CONF. REP. 99-841, H.R. Conf. Rep. No. 841, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 4075, 1986 WL 31988 (Leg.Hist.)

P.L. 99-514, **4075 TAX REFORM ACT OF 1986
DATES OF CONSIDERATION AND PASSAGE
House: December 17, 1985; September 25, 1986
Senate: June 24, September 27, 1986
House Report (Ways and Means Committee) No. 99-426, Dec. 7, 1985 [To accompany H.R. 3838]
Senate Report (Finance Committee) No. 99-313, May 29, 1986 [To accompany H.R. 3838]
House Conference Report No. 99-841, Sept. 18, 1986 [To accompany H.R. 3838]
Cong. Record Vol. 131 (1985)
Cong. Record Vol. 132 (1986)
The Conference Report is set out below.
H.R. CONF. REP. 99-841
P.L. 99-514, TAX REFORM ACT OF 1986
HOUSE CONFERENCE REPORT NO. 99-841
September 18, 1986

3. Authority to Abate Interest Due to Errors or Delay by the IRS

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS' long-established position that once tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unles the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a **4899 mathematical error of an IRS employee who

assists taxpayers in preparing their income tax returns (sec. 6404(d)).

House Bill

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No aspect of the delay can be attributable to the taxpayer. The House bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds of $1 million or less, described below). The interest abatement only applies to the period of time attributable to the failure to perform the ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the IRS and the taxpayer have been in contact. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment.

The IRS must abate interest in certain instances in which it issues an erroneous refund check. There are two limitations on this rule. First, it is not to apply in instances in which the taxpayer (or a related party) has in any way caused the overstated refund to occur. Second, it is not to apply to any erroneous refund checks that exceed $1 million. If the taxpayer does not repay the erroneous refund when requested to do so by the IRS, interest would then begin to apply to the amount of the erroneous refund.

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning after 1981.

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132 Cong. Rec. H7351-01-D, 1986 WL 793950 (Cong.Rec.)

Congressional Record --- House of Representatives

Proceedings and Debates of the 99th Congress, Second Session

Thursday, September 18, 1986

3. Authority to Abate Interest Due to Errors or Delay by the IRS

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not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds of $1 million or less, described below). The interest abatement only applies to the period of time attributable to the failure to perform the ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the IRS and the taxpayer have been in contact. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment.

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This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning after 1981.

Senate Amendment

The Senate amendment is the same as the House bill, except that no significant aspect of the delay can be attributable to the taxpayer, and the provision applies only to failures to perform ministerial acts that occur after the IRS has contacted the taxpayer in writing.

Conference Agreement

The conference agreement follows the Senate amendment, except that the rule requiring the abatement of interest on erroneous refund checks of $1 million or less is only made applicable to erroneous refund checks of $50,000 or less. The provision is effective for taxable years beginning after December 31, 1978.

H.R.Rep. No. 104-506 (1996)

3. ABATEMENT OF INTEREST AND PENALTIES

a. Expansion of authority to abate interest (sec. 301 of the bill and sec. 6404 of the code)

Present law

Any assessment of interest on any deficiency attributable in whole or in part to any error or delay by an officer or employee of the IRS (acting in his official capacity) in performing a ministerial act may be abated.

Reasons for change

The Committee believes that it is appropriate to expand the authority to abate interest to include delays caused by managerial acts of the IRS.

Explanation of provision

The bill permits the IRS to abate interest with respect to any unreasonable error or delay resulting from managerial acts as well as ministerial acts. This would include extensive delays resulting from managerial acts such as: the loss of records by the IRS, IRS personnel transfers, extended illnesses, extended personnel training, or extended leave. On the other hand, interest would not be abated for delays resulting from general administrative decisions. For example, the taxpayer could not claim that the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system resulted in an unreasonable *28 delay in the Service's action on the taxpayer's tax return, and so the interest on any subsequent deficiency should be waived.

Effective date

The provision applies to interest accruing with respect to deficiencies or payments for taxable years beginning after the date of enactment.

b. Review of IRS failure to abate interest
(sec. 302 of the bill and sec. 6404 of the Code)

Present law

Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.

Reasons for change

The Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers.

Explanation of provision

The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

Effective date

The provision applies to requests for abatement after the date of enactment.

H.R.REP. NO. 106-566 (2000)

D. Abatement of Interest (§104 of the Bill and §6404 of the Code)

Present Law

In general

The Secretary of the Treasury can abate or suspend the accrual of interest in a number of situations. In general, the Secretary is authorized to abate interest that is not owed by the taxpayer, either because the interest was erroneously or illegally assessed, or because the interest was assessed after the expiration of the period of limitations. The Secretary also may abate interest that is attributable to certain unreasonable errors and delays by the Internal Revenue Service. The Secretary may abate interest where, in his judgment, the administration and collection costs involved do not warrant the collection of the amount due. The Secretary is required to abate interest in the case of a declared disaster or certain erroneous refunds attributable solely to errors made by the IRS. The Secretary is required to suspend the accrual of interest if the IRS fails to contact the taxpayer in a timely manner and in the case of taxpayers serving in a combat zone.

Interest that is abated is not owed by the taxpayer and does not accrue additional interest through compounding or result in any additional penalties. If the accrual of interest is suspended for a period, then that period is not taken into account in determining the interest owed on an underpayment.

Abatement of interest that is erroneously or illegally assessed

Most abatements of interest are a result of adjustments to the underlying tax liability. Underpayment interest is assessed any time an underpayment is assessed. If the

underlying tax liability is later adjusted, resulting in a reduction in the amount of the underpayment, the portion of the interest attributable to such adjustment must be abated.

Abatements due to unreasonable error or delay by the IRS

If any part of an underpayment of a tax described in section 6212(a) [FN19] is attributable to an unreasonable error or delay by an officer or employee of the Internal Revenue Service, acting in his official capacity, in the performance of a ministerial or managerial act, the Secretary may abate all or a part of the interest on the underpayment. Similarly, if a delay in the payment of tax is attributable to such an officer or employee being erroneous or dilatory *29 in performing a ministerial or managerial act, the Secretary may abate all the interest that would otherwise accrue for that period.

Prior to 1986, the IRS generally did not have the authority to abate interest charges that were properly calculated and based on a correctly determined underpayment. This was the case even if the IRS errors or delays had prevented the earlier satisfaction of the taxpayer's underpayment and resulted in the accrual of additional interest. The Tax Reform Act of 1986 provided the IRS the authority to abate interest where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act. The term 'ministerial act' means "a nondiscretionary act when all of the prerequisites to the (a)ct, such as fact gathering, analysis, decision-making, and conferencing and review by supervisors, have taken place." [FN20] Abatement is available under this authority only where "no significant aspect of the error or delay can be attributable to the taxpayer" [FN21] and relates only to periods after the taxpayer has been contacted for examination. [FN22] The

rule authorizes, but does not require the abatement of interest. Abatement is at the discretion of the Secretary. "Congress did not intend that this provision be used routinely to avoid the payment of interest; rather, it intended that the provision be utilized in instances where failure to perform a ministerial act results in the imposition of interest, and the failure to abate the interest would be widely perceived as grossly unfair." [FN23]

In 1996, the authority to abate interest was expanded to permit the IRS to abate interest with respect to any unreasonable error or delay resulting from the managerial as well as ministerial acts. A managerial act is an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgement or discretion relating to the management of personnel. [FN24] This allows interest to be abated where extensive delays result from managerial acts such as the loss of records by the IRS, IRS personnel transfers, extended illnesses, extended personnel training, or extended leave. "For this purpose, delays resulting from managerial acts do not include delays resulting from general administrative decisions. For example, the taxpayer could not claim that the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system resulted in an unreasonable delay in the Service's action on the taxpayer's tax return, and so the interest on any subsequent deficiency should be waived." [FN25]

The authority to abate interest under this rule does not apply where an underpayment or delay in payment of tax is attributable to an error or delay by an officer or employee of the IRS in the performance of an act that is not managerial or ministerial. Ministerial *30 and managerial acts do not include a decision as to the application of any Federal or state law, including any Federal tax law. [FN26]

The proposed regulations provide a number of examples of situations in which abatement of interest under this rule would or would not be allowed. Abatement is generally limited to situations where resolution of the taxpayer's liability is delayed because the IRS has failed to assign appropriate personnel to a taxpayer's case (a managerial act), there is an unaccountable delay in the issuance of a notice by the IRS (a ministerial act), an IRS employee requests an insufficient amount of payment because he misreads the amount on the taxpayer's master file (a ministerial act), or the IRS loses or misplaces vital information (a managerial act). Abatement is not available where the delay in resolving the taxpayer's liability is attributable to excessive time spent by the IRS in interpreting the tax laws, to erroneous interpretations and calculations made by the IRS, to the IRS' decision to examine other returns prior to the examination of the taxpayer's return, or to other failures to resolve a taxpayer's liability in a timely manner.

Abatement of interest on erroneous refunds

The Secretary is required to abate interest on an erroneous refund for the period from the issuance of the refund until its return is demanded. [FN27] Since the taxpayer has 21 days from the date of demand to pay without interest, [FN28] no interest must be paid as the result of an erroneous refund if the taxpayer repays the refund within 21 days of the IRS asking for its return. If the taxpayer does not repay the refund within the 21 day grace period, interest must be paid from the date the return of the refund is demanded. The rule abating interest in the case of erroneous refunds does not apply if the taxpayer (or a related party) has in any way caused the erroneous refund or if the amount of the erroneous refund exceeds $50,000.

Abatement of penalties and additions to tax attributable to erroneous written advice given by the IRS

The Secretary is required to abate any portion of any penalty or addition to tax attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the IRS acting in his or her official capacity. The abatement applies only if (1) the advice is given in response to a specific written request made by the taxpayer, (2) the taxpayer reasonably relied on the advice, and (3) the taxpayer provided adequate and accurate information. [FN29]

Only penalties and additions to tax that are attributable to erroneous written advice given by the IRS are abated under this rule. Interest is abated only to the extent that it is attributable to abated penalties and additions to tax. Interest attributable to an underpayment of tax, where such underpayment is the result of the taxpayer's proper reliance on written advice of the IRS, is not eligible for abatement.*31

Suspension of the accrual of interest for taxpayers serving in a combat zone [FN30]

Taxpayers serving in a combat zone generally are not required to file tax returns or pay taxes until 180 days after their service in the combat zone is completed. Accordingly, the accrual of interest on any underpayment is suspended during that period. [FN31] This suspension of interest applies to the underpayment of any tax, whether or not related to a return that would otherwise have been due while the taxpayer was serving in the combat zone.

A taxpayer is serving in a combat zone if serving in the Armed Forces of the United States in an area designated as a "combat zone" during the period of combatant activities. An individual who becomes a prisoner of war is considered to continue in such active service. An individual serving in

support of the Armed Forces of the United States in the combat zone, such as Red Cross personnel, accredited correspondents, and civilian personnel acting under the direction of the Armed Forces, are also considered to be serving in the combat zone for this purpose. The designation of a combat zone may be made by the President in an Executive Order, or may be declared legislatively by the Congress. The President must also designate the period of combatant activities in the combat zone (the starting date and the termination date of combat).

The suspension of interest applies during the period of combatant activities in the combat zone, as well as (1) any time of continuous qualified hospitalization resulting from injury received in the combat zone or (2) time in missing in action status, plus the next 180 days.

Taxpayers located in a Presidentially declared disaster area

In the case of a Presidentially declared disaster, the Secretary of the Treasury has the authority to extend the filing date for returns of taxpayers that are located in the disaster area. The Secretary may also extend the payment date for any taxes shown on such an extended return. If the Secretary extends the filing and payment dates, any interest that would otherwise be accrued during the period of the extension must be abated. [FN32]

Suspension of interest where the Secretary fails to contact a taxpayer

For individual taxpayers who have filed a timely Federal income tax return, the accrual of interest is suspended after 1 year if the IRS has not sent the taxpayer a notice specifically stating the taxpayer's liability and the basis for the liability within the specified period. With respect to taxable years beginning before January 1, 2004, the 1-year period is increased to 18 months. Interest and

penalties resume 21 days after the IRS sends the required notice to the taxpayer. The rule applies separately with respect to each *32 item or adjustment [FN33] and does not apply where a taxpayer has self-assessed the tax. The suspension does not apply in the case of fraud. [FN34] Any interest that is assessed with respect to the suspension period is required to be abated.

Procedures for the abatement of interest

Taxpayers may apply for the abatement of interest by filing a claim on Form 843 with the Internal Revenue Service Center that has assessed the interest the taxpayer seeks to have abated. [FN35]

Typically, interest is abated when the amount of tax assessed is reduced. Thus, any procedure that may result in the reduction of assessed tax may also result in an abatement of interest.

Where abatement of interest is sought separate from any redetermination of tax the availability of judicial review depends upon the basis on which abatement is sought. If the IRS is required to abate the interest, judicial review is available to determine if the facts exist that mandate abatement. The Taxpayer Bill of Rights 2 specifically granted jurisdiction to the Tax Court to review for abuse of discretion any decision by the IRS not to abate interest that is attributable to unreasonable error or delay by Service employees in the performance of a ministerial or managerial act, effective for requests for abatement filed after July 30, 1996. [FN36] Otherwise, review of the Secretary's failure to use his or her discretion to abate interest may not be available. The courts have held that judicial review of the IRS' failure to use its discretion to abate interest is generally not available, unless jurisdiction is specifically granted by statute or a standard for review has been established. [FN37]

Reasons for Change

The Committee believes that there are additional situations in which it is not appropriate for the Secretary to collect interest on an underpayment of tax.

Explanation of Provision

Allow the abatement of interest if a gross injustice would otherwise result if interest were to be charged

The bill grants the Secretary the authority to abate interest if a gross injustice would otherwise result if interest were to be charged and no significant aspect of the events giving rise to the accrual of the interest can be attributed to the taxpayer. This authority is intended to allow the Secretary to address those extraordinary situations where normally appropriate rules could result in a gross injustice if strictly applied. It is anticipated that such authority will be used infrequently and will be determined on a case- by-case basis. *33

Abatement under this authority is solely within the discretion of the Secretary.

Allow the abatement of interest for periods attributable to any unreasonable IRS error or delay

The bill grants the Secretary the authority to abate interest for any period that is attributable to unreasonable IRS errors or delays, whether or not related to managerial or ministerial acts. Abatement is not expected to be available to the extent the taxpayer contributes to the delay by providing erroneous information or failing to provide reasonably requested information within a reasonable period, or otherwise failing to timely disclose information or cooperate with reasonable IRS requests.

The bill allows the Secretary to consider abatement of interest in situations where unreasonable errors or delays occur in the context of the consideration of a legal position.

For example, an IRS field agent refers a complicated issue to the IRS National Office. The National Office attorney misplaces the file and is then transferred to a different branch without either notifying his superiors that the file is missing or arranging for the transfer of the issue to his replacement. Some time later, the file is found and the issue reassigned. Assuming that this results in an unreasonable delay in the resolution of the taxpayer's liability, interest for the period from the original misplacing of the file until the issue is reassigned may be abated.

The bill also allows the Secretary to consider abatement in situations where an IRS employee gives erroneous advice or information that the employee knows, or should know, will cause the taxpayer to believe that his liability is resolved. For example, an IRS employee tells a taxpayer by telephone that a payment will be satisfactory to settle his liability for a taxable year. In fact, the IRS employee has made a error in calculating the amount owed by the taxpayer and the amount he requests is insufficient. [FN38] The taxpayer makes the requested payment and is surprised some time later to discover that the IRS is seeking an additional payment for the year. The bill allows the Secretary to abate the interest attributable to the period that occurs after the taxpayer had made the payment he was led to believe would satisfy his liability, provided the taxpayer did not contribute to the error in any significant way, such as by providing erroneous information that was used by the IRS employee to determine the insufficient payment amount.

It is not expected that this expansion of authority will result in an abatement of interest solely because the taxpayer is not able to resolve its tax liability as quickly as the taxpayer would like. Interest owed by a taxpayer will not be abated because other taxpayers have their returns examined first, or because the determination of the taxpayer's liability proves difficult and requires additional

time. Abatement is expected to be available only where the additional time needed to resolve the taxpayer's liability is the result of unreasonable error or delay by the IRS, considering all the facts and circumstances applicable to the taxpayer's case. *34

Allow for the abatement of interest in situations where the taxpayer is repaying an excessive refund based on IRS calculations without regard to the size of the refund

The bill eliminates the $50,000 threshold for abatement of interest on erroneous refunds. Under the bill, the Secretary is required to abate interest on any erroneous refund, provided the taxpayer has not in any way caused the erroneous refund to occur.

Allow the abatement of interest to the extent the interest is attributable to taxpayer reliance on written statements of the IRS

The bill requires the Secretary to abate interest on an underpayment where the underpayment is attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the IRS acting in his or her official capacity. It is anticipated that the abatement would apply to interest attributable to the period of time from the issuance of the erroneous advice through the day that is 21 days (10 days in the case of an underpayment in excess of $100,000) after the day the IRS gives written notice that its advice was erroneous. The bill does not eliminate the taxpayer's obligation to satisfy any underpayment of tax attributable to such erroneous advice.

Effective Date

The changes made by these provisions are effective with respect to interest accruing on or after the date of enactment.

Footnotes:

FN19 The taxes described in section 6212(a) are those with respect to which a deficiency may be assessed. These include the income, estate, gift, generation skipping, and certain excise taxes.

FN20 Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 ("Bluebook") (JCS-10-87), at 1310.

FN21 H.Rept. No. 99-841 (Conference Report on the Tax Reform Act of 1986), at II-811.

FN22 *Id.*

FN23 Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 ("Bluebook") (JCS-10-87), at 1310.

FN24 Treas. Regs. §301.6404-2(b).

FN25 H.Rept. 104-506 (Taxpayer Bill of Rights 2).

FN26 Treas. Reg. §301.6404-2(b).

FN27 27 §6404(e)(2).

FN28 §6601(e)(3).

FN29 §6404(f).

FN30 The relief available to taxpayers serving in combat zones is discussed more fully in Joint Committee on Taxation, Description of Present Law and a Proposal Relating to Tax Relief for Personnel in the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the Northern Ionian Sea (JCX-18-99).

FN31 §7508.

FN32 §6404(h).

FN33 For example, if the IRS sends a math error notice to a taxpayer 2 months after the return is filed and also sends a notice of deficiency related to a different item 2 years later, the suspension of interest applies to the item reflected on the second notice (notwithstanding that the first notice was sent within the applicable time period).

FN34 §6404(g).

FN35 Rev. Proc. 87-43, 1987-2 C.B. 590.

FN36 §6404 (as amended by §301 of the Taxpayer Bill of Rights 2).

FN37 *Horton Homes, Inc. v. United States*, 727 F. Supp. 1450 (M.D. Ga. 1990) *aff'd.*, 936 F.2d 548 (11th Cir. 1991).

FN38 Abatement could be allowed under present law if the error were in the performance of a ministerial act, such as reading the taxpayer's transcript.

No. 06-376

In the Supreme Court of the United States

JOHN F. HINCK, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to 26 U.S.C. 6404(h) (Supp. III 2003), the Tax Court has exclusive jurisdiction to review determinations of the Internal Revenue Service not to grant a taxpayer's request for interest abatement under 26 U.S.C. 6404(e)(1).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 16
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 9
Argabright v. *United States*, 35 F.3d 472 (9th Cir. 1994) 6
Beall v. *United States*, 336 F.3d 419 (5th Cir. 2003) 4, 5, 12, 13
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 8
Broum v. *General Servs. Admin.*, 425 U.S. 820 (1976) ... 9
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 10
Horton Homes, Inc. v. *United States*, 936 F.2d 548 (11th Cir. 1991) 6
Selman v. *United States*, 941 F.2d 1060 (10th Cir. 1991) 6
Smith v. *Robinson*, 468 U.S. 992 (1984) 9
Whitney Nat'l Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 4, 9, 10, 11

Constitution and statutes: Page

U.S. Const.:
Art. I 11
Art. II, § 2, Cl. 2 10
Equal Access to Justice Act, 28 U.S.C. 2412:
28 U.S.C. 2412(d) 14
28 U.S.C. 2412(d)(2)(B) 7
Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762 6
Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 11
§ 301(a), 110 Stat. 1457 ..... 6, 7
§ 301(c), 110 Stat. 1457 7
§ 302(b), 110 Stat. 1458 7
Tucker Act, 28 U.S.C. 1491(a) 3
26 U.S.C. 6404 (1982) 6
26 U.S.C. 6404 (1994) 6
26 U.S.C. 6404 (2000 & Supp. III 2003) 5, 6
26 U.S.C. 6404(e)(1) (1994) ..... *passim*
26 U.S.C. 6404(e)(1) 2, 7
26 U.S.C. 6404(g) (Supp. II 1996) 2
26 U.S.C. 6404(h) (Supp. III 2003) ..... *passim*
26 U.S.C. 6404(h)(1) (Supp. III 2003) 7, 8, 9, 14
26 U.S.C. 6406(h)(2)(B) (Supp. III 2003) 7, 8
26 U.S.C. 6404(h)(2)(C) (Supp. III 2003) 7
26 U.S.C. 6532(a)(1) 9
26 U.S.C. 7430 ..... 5, 7
26 U.S.C. 7430(c)(4)(A)(ii) 7

Statutes–Continued: Page

28 U.S.C. 1346(a)(1) 3
42 U.S.C. 1983 9

Miscellaneous:

141 Cong. Rec. 2025 (1995) 13
H.R. Rep. No. 506, 104th Cong., 2d Sess. (1996) 4, 11, 12, 13

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 446 F.3d 1307. The opinion of the Court of Federal Claims (Pet. Supp. App. 76-106) is reported at 64 Fed.Cl. 71.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. The petition for a writ of certiorari was filed on July 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners John F. Hinck and Pamela F. Hinck filed a joint federal income tax return for 1986. Pet. App. 4. A decade later, while their 1986 tax year was under examination, petitioners made an advance remit-

tance to the Internal Revenue Service (IRS). *Ibid.* Four years later, the IRS made an agreed adjustment to petitioners' 1986 liability, assessed the resulting tax, interest, and penalties, and refunded to petitioners the balance of their advance remittance. *Ibid.*; Pet. Supp. App. 78-79. Petitioners subsequently filed an administrative claim for refund, which included a request that the IRS abate interest under 26 U.S.C. 6404(e)(1). Pet. App. 4; Pet. Supp. App. 80. After the IRS denied that refund request, petitioners, as relevant here, filed suit in the Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Pet. App. 4.

2. The Court of Federal Claims dismissed petitioners' suit for lack of jurisdiction. Pet. Supp. App. 76-106. The court first noted that, as originally enacted, Section 6404(e)(1) (26 U.S.C. 6404(e)(1) (1994)) provided that the IRS "may" abate interest assessed with respect to a deficiency if the interest was attributable to "any error or delay" by the IRS in performing a ministerial act. Pet. Supp. App. 80-81. The court next noted that, in 1996, Section 6404(e)(1) was amended to add the modifier "unreasonable" before "any error or delay," 26 U.S.C. 6404(e)(1), and that a new provision, 26 U.S.C. 6404(g) (Supp. II 1996) (which is now found at 26 U.S.C. 6404(h) (Supp. III 2003)), was added to provide for review in the Tax Court of the denial of a request for abatement. Pet. Supp. App. 81-82. The court observed that, according to the amendments' effective dates, the first amendment—the addition of the modifier "unreasonable"—did not apply to the case before it, but that the second amendment—providing for review in the Tax Court—did apply to the case before it. *Ibid.* The court explained that, prior to its amendment in 1996, the permissive language of Section 6404(e)(1)—*i.e.*, the use of

the word "may" and the absence of any standard by which the IRS's decision might be judged—had consigned the determination whether to abate interest to the Commissioner's sole discretion, with the result that the Commissioner's determination not to abate interest was not reviewable by the courts. *Id.* at 89-93. Because the applicable version of Section 6404(e)(1) was unchanged from the version of that subsection at issue in earlier cases, the court reasoned, the IRS's determination remained unreviewable. *Id.* at 95-97.

The court further explained that its jurisdiction in tax refund suits derived solely from the Tucker Act, 28 U.S.C. 1491(a), and not from 28 U.S.C. 1346(a)(1), which grants the federal district courts concurrent jurisdiction in tax refund suits. Pet. Supp. App. 87. Tax refund suits, the court reasoned, represent a category of cases arising under the Tucker Act that involves the illegal exaction of money. *Id.* at 85. If the decision whether to abate interest is consigned to agency discretion, the court explained, the IRS's refusal to abate interest cannot be "illegal." *Id.* at 89. Thus, the court concluded, it lacks subject-matter jurisdiction to review any issue consigned to agency discretion, including the Commissioner's determination not to abate interest under the version of Section 6404(e)(1) at issue here. *Id.* at 89, 105-106.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1-17. It held that 26 U.S.C. 6404(h) (Supp. III 2003) granted the Tax Court exclusive jurisdiction to review the Commissioner's determination not to abate interest under Section 6404(e)(1).[1] Pet. App. 11.

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[1] The Federal Circuit thus found it unnecessary to reach the justiciability question addressed by the Court of Federal Claims. The

The Federal Circuit explained that the statute expressly grants jurisdiction only to the Tax Court, specifies a particular procedure and standard of review to be used by that court, and grants the Tax Court the power to issue a remedy. *Id.* at 11-12. The Federal Circuit also found it significant that the Tax Court is a specialized court with expertise in tax matters. *Id.* at 13. It emphasized that where statutory review procedures are designed to permit agency expertise to be brought to bear on the matter, those procedures are presumed to be exclusive. *Id.* at 12 (quoting *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

The Federal Circuit also observed that the legislative history of 26 U.S.C. 6404(h) (Supp. III 2003) confirms that the Tax Court has exclusive jurisdiction over interest-abatement claims. Pet. App. 13-14. The court noted that, although Congress observed in the House Report (H.R. Rep. No. 506, 104th Cong., 2d Sess. 28 (1996)) that then-existing law denied jurisdiction to any court to review the IRS's refusal to abate interest, Congress's response was not to grant jurisdiction to the district courts and the Court of Federal Claims, but, instead, to vest jurisdiction only in the Tax Court. Pet. App. 13-14.

The Federal Circuit acknowledged (Pet. App. 16) that its decision was in conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003). It stated, however, that the procedural anomalies identified by the Fifth Circuit—that some taxpayers would have to split their claims and that other taxpayers'

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justiciability question lacks continuing importance in any event because the enactment of Section 6404(h) made it clear that the IRS's decision not to abate interest could be challenged in the Tax Court for an abuse of discretion.

interest-abatement claims would not be reviewable in any forum—did not persuade it to construe the statute differently. Pet. App. 16-17. The legislative history, the Federal Circuit explained, clearly established that Congress intended that, under Section 6404(h), taxpayers who exceeded the net-worth requirements for seeking attorneys' fees under 26 U.S.C. 7430 could not seek review of the IRS's interest-abatement determination. Pet. App. 16. The Federal Circuit further explained that Congress was well aware that district courts had jurisdiction over refund claims, but nonetheless specifically granted only the Tax Court jurisdiction to review interest-abatement requests. Thus, the possibility that some claims might be split did not compel the court to ignore the clear statutory language. *Id.* at 16-17.

ARGUMENT

The court of appeals correctly held that the Tax Court has exclusive jurisdiction to review the Commissioner's decision to abate interest under 26 U.S.C. 6404 (2000 & Supp. III 2003), and that the Court of Federal Claims therefore lacked jurisdiction over petitioners' claim. The decision below does conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003), which held that Tax Court jurisdiction to review IRS interest-abatement decisions was not exclusive, and that district courts also had such jurisdiction. In addition, the question presented is a recurring one that has substantial administrative importance. Thus, the question presented may warrant this Court's review at an appropriate time. Nevertheless, given that the Federal Circuit's decision directly affects only the jurisdiction of the Court of Federal Claims and is not binding on the jurisdiction of any district court, the Court may prefer

to await a concrete conflict affecting the jurisdiction of the federal district courts before reviewing the question.

1. The Secretary of the Treasury is authorized to abate a tax or liability assessment in certain circumstances. 26 U.S.C. 6404 (2000 & Supp. III 2003). In 1986, Congress amended 26 U.S.C. 6404 (1982) by adding new subsection (e)(1), which for the first time authorized the Secretary to grant an abatement of interest attributable to ministerial errors and delays by the IRS. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762. Several courts held that the Secretary's decision not to grant such an abatement under subsection (e)(1) was not judicially reviewable, because that subsection provided no tests or standards by which to adjudicate the correctness of the determination, thus consigning the decision whether to abate interest to the Secretary's sole discretion. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991).

2. In 1996, Congress again amended 26 U.S.C. 6404 (1994) to add present subsection (h). Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 301(a), 110 Stat. 1457. That subsection provides for Tax Court review of the Commissioner's determination not to abate interest:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing

> of the Secretary's final determination not to abate such interest.

26 U.S.C. 6404(h)(1) (Supp. III 2003). The reference to 26 U.S.C. 7430 restricts the availability of review to individual taxpayers whose net worth does not exceed $2 million, and businesses whose net worth does not exceed $7 million. See 26 U.S.C. 7430(c)(4)(A)(ii); 28 U.S.C. 2412(d)(2)(B). Section 6404(h) also provides that, if the Tax Court determines that the IRS abused its discretion in declining to abate interest, it may order a refund. 26 U.S.C. 6404(h)(2)(B) (Supp. III 2003). It further provides that an order of the Tax Court under Section 6404(h) is reviewable by the courts of appeals, but "only with respect to the matters determined in such order." 26 U.S.C. 6404(h)(2)(C) (Supp. III 2003).

At the same time that it added subsection (h), Congress amended subsection (e)(1) by adding the word "unreasonable" before the words "error or delay," and by changing the words "ministerial act" to "ministerial or managerial act." Taxpayer Bill of Rights 2, § 301(a), 110 Stat. 1457. Congress gave different effective dates to the two amendments, however, with the result that the present case is subject to subsection (h), but is governed by the original version of Section 6404(e)(1).[2]

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[2] The amendments to subsection (e)(1) are effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996. Taxpayer Bill of Rights 2, § 301(c), 110 Stat. 1457. Subsection (h), however, is effective for all requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved. § 302(b), 110 Stat. 1458.

The copy of Section 6404(e)(1) reproduced in petitioner's appendix (Pet. App. 42) is not an accurate copy of either the original statute (effective for tax years ending on or before July 30, 1996, including the year at issue here) or the amended statute (effective for all later tax

3. As the court of appeals here correctly concluded (Pet. App. 11), Section 6404(h) grants to the Tax Court exclusive jurisdiction to review the IRS's determination not to abate interest under Section 6404(e)(1). The court of appeals thus correctly declined to follow the Fifth Circuit's contrary decision in *Beall*, which held that the enactment of Section 6404(h) did not grant the Tax Court exclusive jurisdiction in these matters. 336 F.3d at 428-430; Pet. App. 34-36.

a. The grant of jurisdiction to the Tax Court in 26 U.S.C. 6404(h) (Supp. III 2003) provides for exclusive Tax Court review. By its plain language, Section 6404(h) grants jurisdiction to a particular court—the Tax Court—to review the Secretary's denial of interest abatements, and also provides a particular standard—abuse of discretion—to be applied by that court. 26 U.S.C. 6404(h)(1) (Supp. III 2003) ("The Tax Court shall have jurisdiction over any action * * * to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion."). Section 6404(h) also gives the Tax Court the power to issue a remedy, by ordering an abatement, 26 U.S.C. 6404(h)(1), and, if necessary, determining an overpayment, 26 U.S.C. 6404(h)(2)(B) (Supp. III 2003). Cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) (holding that a statute clearly conferring the right to judicial review in some circumstances and for some classes of claimants may impliedly preclude judicial review in other circumstances and for other classes).

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years): it includes the words "unreasonable" and "or managerial" in some, but not all, of the places they appear in the amended statute. A correct copy of Section 6404(e)(1), as it applies to this case, is reproduced at App., *infra*, 1a.

This Court has explained "[i]n a variety of contexts" that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976) (citing cases). In *Brown* itself, this Court held that the specific and express provision for administrative and judicial review in Section 717 of the Civil Rights Act of 1964, governing discrimination in federal employment, precluded any reliance on Title VII, even though the terms of Title VII were broad enough to apply to federal employment. *Id.* at 831-835; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). See also, *e.g.*, *Smith* v. *Robinson*, 468 U.S. 992, 1011-1012 (1984) (refusing to permit claims under 42 U.S.C. 1983 where Congress provided a more restrictive private remedy in another statute). Here, Congress has expressly provided for review in the Tax Court, and has limited the class of taxpayers who may challenge an interest-abatement determination. In addition, it has provided a 180-day statute of limitations period for challenges to interest-abatement determinations in the Tax Court, see 26 U.S.C. 6404(h)(1) (Supp. III 2003), whereas the general limitations period for refund claims in district court is two years, see 26 U.S.C. 6532(a)(1). It would be inconsistent with Congress's limited remedial scheme to permit all taxpayers to bring interest-abatement claims in district court.

Similarly, this Court has explained that where "Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). Here, as

in *Whitney National Bank*, Congress has established a "carefully planned and comprehensive method for challenging [administrative] determinations." *Ibid.* In that case, the Court explained that, in establishing a particular statutory review procedure, Congress intended to permit an agency—in that case, the Federal Reserve Board—to pass on matters within its area of expertise. *Ibid.* Under those circumstances, "[t]o permit a district court to make the initial determination * * * would substantially decrease the effectiveness of the statutory design." *Ibid.* Accordingly, the Court held that the statutory review procedure was "the sole means" by which the administrative determination might be reviewed. *Id.* at 419.

As the Federal Circuit concluded, the same reasoning applies here: "Even though the Tax Court is not an agency, it is a specialized court with expertise in tax matters. * * * In this context, permitting the Court of Federal Claims to make a concurrent determination as to the propriety of a denial of interest abatement 'would substantially decrease the effectiveness of the statutory design.'" Pet. App. 13 (quoting *Whitney Nat'l Bank*, 379 U.S. at 420).[3]

b. The Fifth Circuit's contrary view in *Beall* is mistaken. That court concluded that by specifically granting jurisdiction to the Tax Court, Congress somehow made administrative interest-abatement decisions

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[3] In *Freytag* v. *Commissioner*, 501 U.S. 868, 885-889 (1991), this Court held that, for purposes of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, the Tax Court is not a "Department" of the Executive Branch. But whether the Tax Court is viewed as a court or an Executive Branch agency, it is the exclusive forum provided by Congress for reviewing challenges to IRS interest-abatement decisions.

reviewable in federal district courts as well. 336 F.3d at 430; Pet. App. 37. According to the Fifth Circuit, Congress mentioned only the Tax Court in its legislation, and did not mention the federal district courts, because the Tax Court is a statutory court which has only the powers specifically conferred upon it by Congress. 336 F.3d at 430; Pet. App. 36-37. That reasoning, however, is inconsistent with the Court's holding in *Whitney National Bank*. As noted above, the Court in that case held that a grant of jurisdiction to the Federal Reserve Board established the exclusive method of review. *Whitney Nat'l Bank*, 379 U.S. at 420. Like the Tax Court, the Federal Reserve Board possesses only the power to adjudicate controversies that has been specifically conferred upon it by Congress. Yet the Court held that the establishment of a review procedure before the Federal Reserve Board precluded review by the federal district courts. *Ibid.* Thus, legislation that mentions only an Article I court of limited jurisdiction may preclude review in federal district courts.

The *Beall* court similarly erred in concluding that interpreting Section 6404(h) to grant the Tax Court exclusive jurisdiction to adjudicate interest-abatement matters would impliedly repeal the jurisdiction of the district courts over such matters. The House Report accompanying the Taxpayer Bill of Rights 2 states that, under then-present law, "Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." H.R. Rep. No. 506, *supra*, at 28. It is thus apparent that Congress understood that, prior to 1996, the district courts could not review the IRS's determination not to abate interest. Whether that conclusion flowed from justiciability concerns or lack of subject-matter jurisdiction, Congress described the pro-

scription under the general concept of jurisdiction, and expressly provided that the Tax Court should have jurisdiction to consider and decide such matters. Thus, the report states that "[t]he Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers," without any suggestion of district court jurisdiction over such claims. *Ibid.* The further explanation of the provision gives no hint that the Secretary's decision not to abate interest might be reviewable anywhere other than the Tax Court:

> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

Ibid. As the Federal Circuit explained, "[c]learly, in 1996, Congress recognized that the courts generally do not have jurisdiction over interest abatement claims. However, Congress did not then grant jurisdiction to district courts and the Court of Federal Claims. Rather, the language of § 6404 vests jurisdiction specifically in the Tax Court." Pet. App. 14.[4]

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[4] In *Beall*, 336 F.3d at 428 n.11; Pet. App. 33 n.11, the court suggested that the House Report, in describing the then-current law that precluded federal courts from exercising jurisdiction to review the

c. As the Federal Circuit concluded, Pet. App. 16-17, the so-called "anomalies" identified by the Fifth Circuit do not justify departure from the words Congress used to convey its intention. The first of those—that wealthy taxpayers will be without recourse to judicial review—is (as the Federal Circuit observed) no anomaly at all: as noted above, Congress intended to fashion relief for small taxpayers only. See H.R. Rep. No. 506, *supra*, at 28 ("it is appropriate for the Tax Court to have jurisdiction to abate interest with respect to *certain taxpayers*" (emphasis added)); 141 Cong. Rec. 2025 (1995) (material appended to statement of Sen. Bryan). Petitioners' assertion that the statutory distinction between small and large taxpayers violates the latter's due process rights, Pet. 26-28, is unconvincing. As petitioners admit (Pet. 26), prior to the 1996 amendments no taxpayer could obtain review of agency interest-abatement determinations in any court. And, as the Federal Circuit pointed

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IRS's refusal to abate interest, misused the term "jurisdiction." But, as the Court of Federal Claims below aptly explained (Pet. Supp. App. 102 n.21):

> if the House Report meant to refer to "justiciability" instead of "jurisdiction" in its statement of "present law," then one must assume that it made the same "mistake" when it indicated that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS' failure to abate interest." By comparison, the Fifth Circuit interpreted the first reference to "jurisdiction" as meaning justiciability, but the second as truly meaning "jurisdiction." In [this] court's view, this analysis of this legislative history is a *non sequitur*.

In any event, even if the House Report had misused the term "jurisdiction," the fact remains that the contemporaneous judicial construction was that the courts were barred from reviewing the agency determination, and there is no indication that Congress intended to eliminate that bar with respect to any court other than the Tax Court.

out (Pet. App. 16), the precise distinction between smaller and larger litigants that is applied in 26 U.S.C. 6404(h) (Supp. III 2003) is also found in 26 U.S.C. 7430 and is ultimately derived from the more generally applicable Equal Access to Justice Act, 28 U.S.C. 2412(d).

Indeed, the net-worth test of Section 6404(h)(1) simply reflects Congress's judgment that the protection afforded by Section 6404(e)(1) is more appropriate for small than for large taxpayers. Under Section 6404(e)(1), interest may be abated only for administrative errors and delays occurring after the IRS has contacted the taxpayer in writing regarding a deficiency or payment. Once the taxpayer is contacted in writing, he has a choice: he may immediately pay the tax (and any interest that has accrued to that date) and then contest the liability in a refund suit, or he may contest the liability before payment in the Tax Court. If, upon being contacted by the IRS, a taxpayer chooses to pay, no more interest accrues. A taxpayer who chooses to pay upon being contacted in writing, therefore, has fully protected himself against the possibility that any subsequent administrative error or delay will cause additional interest to accrue, and can have no need for the protection afforded by Section 6404(e)(1). Thus, the only taxpayers who require the protection of that section are those taxpayers who, for financial reasons, cannot protect themselves by paying before litigating their dispute with the IRS. The net-worth test of Section 6404(h) thus reflects the fact that small taxpayers may benefit from the protection of judicial review, whereas large taxpayers can typically protect themselves against administrative errors and delays simply by paying the tax asserted to be due.

The second so-called "anomaly," that a taxpayer may have to bring his interest-abatement claim and his substantive refund claim in different courts, is, as the Federal Circuit explained, a "policy concern [that] does not compel a different statutory construction when the statute seems clear." Pet. App. 17. Petitioners' suggestion that the Federal Circuit's rule would require the splitting of a single claim, with preclusive effects on the second litigation, Pet. 29-30, is unfounded. Because a taxpayer could not bring an interest-abatement claim in a refund suit in a district court or the Court of Federal Claims, estoppel could not apply.

4. The question presented in this case is sufficiently important and recurring to warrant this Court's review in an appropriate case. As the district court decisions referenced above establish, the exclusivity *vel non* of the Tax Court's jurisdiction to review determinations of the Secretary denying the abatement of interest is an often-litigated issue. Moreover, the conflict concerns not only which forums are available to a taxpayer seeking review of an administrative denial of interest abatement, but also whether taxpayers who exceed the net-worth requirements of Section 6404(h) may obtain judicial review of agency interest-abatement decisions in any forum.

Nevertheless, this Court's review may not be warranted at this time. At present, the conflict in the courts of appeals is limited to the abstract disagreement between the Fifth Circuit, which held that district courts have concurrent jurisdiction to hear interest-abatement claims, and the Federal Circuit in this case, which held that the Court of Federal Claims lacks jurisdiction over those claims because they can only be brought in the Tax Court. There is currently no circumstance in which taxpayers would be subject to different rules depending

on their residence. All taxpayers nationwide are affected equally by the Federal Circuit's decision, which governs only to the nationwide jurisdiction of the Court of Federal Claims. The Fifth Circuit is the only court of appeals to have confronted the question whether the federal district courts possess jurisdiction to review interest-abatement determinations, and there is at present no conflict among the regional circuits on that question. Accordingly, under the current state of the appellate case law, no taxpayer may obtain review of interest-abatement determinations in the Court of Federal Claims, but there is no binding precedent banning any taxpayer from seeking such review in the district courts. Notwithstanding the current conflict and the importance of the question presented, therefore, the Court may prefer to await an actual conflict concerning district court jurisdiction, should one develop, before reviewing the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2006

APPENDIX

1. 26 U.S.C. 6404(e) (1994) provides, in pertinent part:

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service

(1) In general

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such officer or employee being erroneous or dilatory in performing a ministerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

* * * * *

2. 26 U.S.C. 6404(h) (Supp. III 2003) provides:

(h) Review of denial of request for abatement of interest

(1) In general

The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

(2) Special rules

(A) Date of mailing

Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

(B) Relief

Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

(C) Review

An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

Supreme Court, U.S.
FILED
06-376 JUL 28 2006
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENT TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENT TO APPENDIX - Table of Contents

Trial Court Opinion Below:

Hinck v. United States,
64 Fed.Cl. 71 (2005) ..... App. 76

In the United States Court of Federal Claims.

No. 03-865T

(Filed: February 3, 2005)

JOHN F. HINCK and PAMELA HINCK,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* Income tax; motion to
* dismiss for lack of
* jurisdiction; interest;
* abatement under
* §6404(e)(1) of the Internal
* Revenue Code;
* jurisdiction under 28
* U.S.C. §1491 versus 28
* U.S.C. §1346; illegal
* exaction jurisdiction;
* whether the denial of
* abatement claim under
* 6404(e)(1), as amended
* by the 1996 Taxpayer Bill
* of Rights II, is subject to
* judicial review; review of
* abatement denial
* nonjusticiable; dismiss
* for lack of jurisdiction.

OPINION

Teresa J. Womack, Redding & Associates, P.C., Houston, Texas, for plaintiff.

Ellen C. Specker, United States Department of Justice, Washington, D.C., with whom was Assistant Attorney General *Eileen J. O'Connor*, for defendant.

ALLEGRA, Judge:

If the amount of any tax imposed under the Internal Revenue Code (26 U.S.C.) is not paid on or before the last date prescribed therefor, interest on the underpayment is imposed from that last date to the date paid at statutorily prescribed rates. 26 U.S.C. §6621 (2000). Prior to 1986, the Internal Revenue Service (IRS) lacked the authority to abate such interest. That changed when Congress, as part of the Tax Reform Act of 1986, Pub.L. No. 94- 514, §1563, 100 Stat. 2085, 2762 (1986), enacted section 6404(e)(1) of the Code, which authorizes the Secretary of the Treasury to abate interest to the extent that it is attributable to IRS errors or delays in performing ministerial acts. In the years following this enactment, numerous courts held that a taxpayer could not obtain judicial review of an IRS decision not to abate interest under this section. However, in 1996, Congress amended the statute, providing, *inter alia,* jurisdiction for review of abatement denials in the United States Tax Court. *See* Taxpayer Bill of Rights II, Pub.L. No. 104-168, §§301(a), 302(a), 110 Stat. 1452 (1996). The question in the case *sub judice* is whether the version of section 6404(e)(1) applicable to the tax year in question allows this court to review the Secretary's decision not to abate interest herein. For the reasons that follow, the court concludes that it does not.

I. FACTS[1]

During his taxable year 1986, plaintiff John Hinck was a limited partner in Agri-Cal Venture Associates ("ACVA") and, through ACVA, indirectly held an interest in Rancho California Partners II ("RCP2"). Plaintiff Pamela F. Hinck allegedly is involved in this action solely by virtue of having filed a joint return with her husband for 1986.

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[1] For purposes of RCFC 12(b), the court must construe the plaintiffs' allegations in the light most favorable to the them. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

On March 14, 1990, the IRS issued notices of final partnership administrative adjustment (FPAA) to ACVA and RCP2, respectively, that determined adjustments to deductions reported on Form 1065 partnership returns in the total amount of $32,815,885 (ACVA) and $17,102,647 (RCP2). On June 13, 1990, a notice partner for each partnership separately filed petitions for readjustment in the United States Tax Court. *Agri-Cal Venture Assoc., William T. and Carroll S. Flowers, Partners Other than the Tax Matters Partner v. Comm'r,* Docket No. 012530-90; *Rancho California Partners-II, William Young, A Partner Other Than the Tax Matters Partner v. Comm'r,* Docket No 012535-90. On or about May 17, 1996, plaintiffs made an advance remittance of $93,890.00 to the IRS toward any deficiency of income tax that might result from the adjustments to the partnership returns. On March 10, 1999, plaintiffs executed Forms 870-P(AD), pursuant to which they agreed to settle outstanding tax issues involving their investments in ACVA and RCP2. The IRS counter-signed the Forms 870-P(AD) on May 5, 1999. Although the parties dispute the exact contours of the settlement, they agree that the partnership item adjustments were resolved.

Tax deficiencies arose from these adjustments, on which interest was assessed pursuant to section 6621(c) of the Code. On November 30, 1999, the IRS notified the plaintiffs that, in accordance with the settlement, $64,337 of the ACVA reported loss on the partnership's 1986 tax return would be disallowed, generating an additional tax liability of $16,409. According to plaintiffs' complaint, on February 14, 2000, the IRS assessed additional tax and interest against the Hincks, for the taxable year 1986, in the amounts of $16,409.00 and $21,669.22, respectively. That same day, the IRS applied the advance remittance payment to this amount and refunded plaintiffs the balance, $55,811.78.

On June 14, 2000, plaintiffs filed a Form 843, Claim for Refund and Request for Abatement, for their taxable year 1986. Only one of the asserted grounds for refund included in the claim is still at issue, *to wit,* that, owing to IRS errors and delays, interest assessed against plaintiffs should be abated, pursuant to section 6404(e)(1) of the Code, for the period beginning with the IRS' criminal investigation of several of Mr. Hinck's associates and ending with the termination of that investigation--a period from March 21, 1989, until April 1, 1993. In their claim, plaintiffs asserted that, during this period, the seizure of partnership records impaired their ability to defend against the IRS' asserted adjustments to partnership items. They alleged that their abatement claim was not barred by the 1999 settlement, which provided that "no claim for refund or credit based on any change in the treatment of partnership items may be filed or prosecuted," because it did not seek a change in the treatment of partnership items. The IRS denied the claim by letter dated April 30, 2001.

On April 30, 2003, plaintiffs filed their complaint in this action, seeking a judgment in the amount of $18,121.98, plus attorney's fees, interest and costs. On March 11, 2004, defendant filed a motion under RCFC 12(b)(1), seeking to dismiss plaintiffs' claim that the Secretary should have abated interest that accrued during the aforementioned criminal investigation. Defendant argues that this court lacks jurisdiction to hear the case because the United States Tax Court has exclusive jurisdiction over this matter and because the issue presented is nonjusticiable. On May 3, 2004, plaintiffs filed their response to this motion; defendant filed its reply on May 7, 2004. Oral argument was heard on September 14, 2004.

II. DISCUSSION

In the case *sub judice,* plaintiffs contend that the Secretary should have abated a portion of the interest that

accrued on the deficiency attributable to the settlement of their 1986 tax liability, as it related to their investment in ACVA and RCP2. Plaintiffs premise that claim on section 6404 of the Code, as amended in 1996, which, *inter alia,* allows the Secretary to abate interest when the interest accrued as a result of an error or delay by an IRS employee in performing a ministerial act. They claim that the 1996 amendments renders inapposite a legion of prior decisions holding that the Secretary's exercise of authority under the original version of section 6404(e)(1) is not subject to judicial review. Not so, defendant claims. It remonstrates that this court lacks subject matter jurisdiction over this complaint, asserting that, at least for the abatement request in question, the various amendments made to section 6404 neither alter significantly the prior judicial landscape nor, in particular, provide this court with jurisdiction to review the denial of an abatement claim under section 6404(e)(1).

Section 6404(e) was enacted by the Tax Reform Act of 1986, §1563, Pub.L. No. 99-514, 100 Stat 2085, 2762, which provided:

> (a) In General.--Section 6404 (relating to abatements) is amended by adding at the end thereof the following new subsection:
>
> "(e) ASSESSMENTS OF INTEREST ATTRIBUTABLE TO ERRORS AND DELAYS BY INTERNAL REVENUE SERVICE.--
>
> "(1) In General. In the case of any assessment of interest on--
>
> > "(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

> "(B) any payment of any tax described in section 6212(a) to the extent that any delay in such payment is attributable to such an officer or employee being dilatory in performing a ministerial act,
>
> the Secretary may abate the assessment of all or any part of such interest for any period...."

The accompanying legislative reports indicated that this statute was enacted to afford the Secretary the authority to abate interest under circumstances in which the IRS caused the taxpayer to incur additional interest charges. *See* S.Rep. No. 99-313, at 208 (1986); H.R.Rep. No. 99-426, at 844 (1985); *see also McMullen v. United States,* 21 Cl.Ct. 248, 250 (1990).

In the 1996 Taxpayer Bill of Rights II, *see* Pub.L. No. 104-168, §§301-02, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.) (hereinafter "the 1996 Act"), Congress made two changes to section 6404. First, to section 6404(e)(1), it added "unreasonable" to modify the words "error or delay," and added "or managerial act," where before only "ministerial act" had appeared. *See* Pub.L. No. 104-168, at §301(a)(2). [2] This amendment, however, does not apply to the taxable year at issue, as it is effective only for "interest accruing with respect to deficiencies or payments for taxable years beginning after the date of the enactment of" the Act, *i.e.,* July 30, 1986. *Id.* at §301(c). Second, in an amendment originally codified as section 6404(g), Congress provided for review in the Tax Court of the denial of any abatement request made under

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[2] As thus amended, §6404(e)(1)(A) reads: "any deficiency attributable in whole or in part to any ***unreasonable*** error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial ***or managerial*** act ..." (emphasis added).

section 6404, including presumably those under section 6404(e)(1), thusly--

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

Id. at §302(a). This provision is effective for requests for abatement made after the Act's date of enactment, and applies to plaintiffs. *Id.* at §302(c). [3] But, for reasons unexplained, plaintiffs have pursued their claim here, giving rise to the jurisdictional dispute that now occupies the court.

Initially, it is helpful to place the claims here in their proper context, requiring the court, in turn, to identify the statute that gives rise to its tax refund jurisdiction and to determine whether that statute is properly invoked here. Both parties agree that jurisdiction in this case is not afforded by the Administrative Procedures Act (APA), 5 U.S.C. §701, *et seq.* (2000), which, as they note, does not constitute a grant of jurisdiction to this court. *See Crocker v. United States,* 125 F.3d 1475, 1476-77 (Fed.Cir.1997); *Moody v. United States,* 58 Fed.Cl. 522, 524 (2003). The statute generally defining the subject matter jurisdiction of this court is the Tucker Act, first enacted in 1887, which

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[3] Section 6404(g) was redesignated 6404(i) by the IRS Restructuring and Reform Act of 1998, Pub.L. No. 105-206, §3305, 112 Stat. 743. Thus, from 1998 until 2002, it appeared in the United States Code as 26 U.S.C. §6404(i). In 2002, Pub.L. No. 107-134, §112(d)(1), 115 Stat. 2427, repealed the former subsection (h) and designated then subsection 6404(i) as subsection (h), a designation that still holds.

provides, in pertinent part, "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department ...." 28 U.S.C. §1491(a)(2000). This statute is complemented--some might say, complicated--by 28 U.S.C. §1346(a)(1) (2000), which affords the federal district courts, "concurrent" with this court, jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected ... or any sum allemnjjm ged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." But this begs the question--which of the latter two statutes provides the basis for this court's refund jurisdiction?

One of the earliest case to examine this jurisdictional issue is *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 31-32, 35 S.Ct. 499, 59 L.Ed. 825 (1915) in which Justice Holmes, while defining the parameters of the district court's refund jurisdiction, observed that the Court of Claim's tax refund jurisdiction derived from the Tucker Act, as amended by the Act of March 3, 1911, ch. 231, 36 Stat. 1087.[4] At the time of Holmes' opinion, the predecessor

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[4] Earlier decisions of the Supreme Court had predicated the Court of Claims' tax jurisdiction on the Act of February 25, 1855, ch. 122, 10 Stat. 612, which empowered the fledgling court to determine "all claims founded upon any law of Congress." Initially, in *Nichols v. United States*, 7 Wall. 122, 74 U.S. 122, 131, 19 L.Ed. 125 (1868), the Supreme Court held that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims." The Court later distinguished *Nichols* in *United States v. Kaufman*, 96 U.S. 567, 570, 24 L.Ed. 792 (1877), holding that jurisdiction was lacking in the former case only because a more specific revenue statute provided a special remedy. Absent that circumstance, the *Kaufman* Court concluded, a tax refund case could be brought under the Court of Claims' basic jurisdiction. Then, in *United States v. Real Estate Sav. Bank*, 104 U.S. 728, 17 Ct.Cl. 434, 26 L.Ed. 908 (1881), the Court found that the revenue claim at issue was

to section 1346, indeed, had not yet been enacted--that did not occur until the Revenue Act of 1921, ch. 136, §1310(c), 42 Stat. 311, in which Congress provided taxpayers the ability to sue in the district courts for sums exceeding $10,000, where the tax collector had died. *See Flora v. United States,* 362 U.S. 145, 152-53, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960); *see also Smietanka v. Indiana Steel Co.,* 257 U.S. 1, 5- 6, 42 S.Ct. 1, 66 L.Ed. 99 (1921) (holding, prior to the passage of this statute, that actions against tax collectors were personal and could not be maintained against a successor). As noted in *Flora,* the legislative history accompanying this Revenue Act, albeit scarce, uniformly describes it as dealing with the jurisdiction of the district courts; no reference was made to the Court of Claims or its preexisting Tucker Act jurisdiction. *See* H.R. Conf. Rep. No. 67-486 at 57 (1921); 61 Cong. Rec. 7506-07 (1921) (statement of Sen. Jones); *see also* 67 Cong. Rec. 575 (1926) (statement of Rep. Britton). That the Court of Claim's refund jurisdiction predated the passage of the 1921 Revenue Act was confirmed in *Williamsport Wire Rope Co. v. United States,* 277 U.S. 551, 561, 48 S.Ct. 587, 72 L.Ed. 985 (1928), a case involving excess profits and war profits taxes, in which the Supreme Court observed that the "jurisdiction of the Court of Claims, if any, rests on statutory provisions which long antedate the Revenue Act of 1918."

In a number of later cases, arising over the years in variety of settings, the Court of Claims reaffirmed that its refund jurisdiction derived from the Tucker Act. Thus, in *New England Mut. Life Ins. Co. v. United States,* 72 Ct.Cl.

"founded upon a law of Congress" and, therefore, within the Court of Claims' jurisdiction under the 1855 Act. For an excellent discussion of these cases, the origins of this court's tax jurisdiction, and more generally, the evolution of the modern refund suit, *see* M. Carr Ferguson, *Jurisdictional Problems in Tax Controversies,* 48 Iowa L.Rev. 312, 327-331 (1962-1963) (hereinafter "Ferguson").

658, 52 F.2d 1006 (1931), it rejected the notion that its tax jurisdiction instead was based upon the precursor to section 1346, stating that the latter provision "related solely to the jurisdiction of District Courts of the United States" and further that "[t]he jurisdiction of this court in cases of this character is in no wise dependent upon" these provisions. *Id.* at 1008; *see also Usibelli Coal Mine v. United States,* 54 Fed.Cl. 373, 375 n. 6 (2002) (discussing *New England Mut. Life*). In *Kirkendall v. United States,* 90 Ct.Cl. 606, 31 F.Supp. 766, 769-70 (1940), the Court of Claims then held that tax refund suits represented a category of case arising under the Tucker Act involving "illegally received money." The latter comment foreshadowed *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002 (1967), in which the court identified two classes of claims arising under the Tucker Act--"those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Id.* at 1007; *see also United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). The court identified "tax refund suits" as a prime example of the former class--so-called "illegal exaction" claims--"where money or property has been paid or taken" and it is alleged that "the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." 372 F.2d at 1007; *see also S. Puerto Rico Sugar Co. Trading Corp. v. United States,* 167 Ct.Cl. 236, 334 F.2d 622, 626 (1964).[5]

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[5] *Eastport* was decided after section 1346 was codified in its current form in 1948. *See* Act of June 25, 1948, 62 Stat. 869, 932 (1948). In 1954, section 1346 was expanded to allow district courts to hear refund suits involving in excess of $10,000. *See* Act of July 30, 1954, ch. 648, §1, 68 Stat. 589. (The earlier provision allowing for such suits was triggered only where the collector was deceased or no longer in office-- *see* Revenue

Summarizing the teachings of these cases, in 1964, a well-known tax scholar concluded that–

> The jurisdiction of the Court of Claims in tax cases is conferred by 28 U.S.C. §1491 ... and its jurisdiction over any set-offs or counterclaims of the Government is founded upon 28 U.S.C. §§1503, 2508 .... Although the Court of Claims is mentioned in 28 U.S.C. §1346 ..., it is only mentioned in passing by this younger statutory provision, reference being made to the jurisdiction already extended under the other sections.

Ferguson, *supra*, at 346 n. 175. More recent times have seen the Federal Circuit and this court continue to track this view of the law. *See, e.g., Ontario Power Generation v. United States*, 369 F.3d 1298, 1301-02 (Fed.Cir.2004); *Shore v. United States*, 9 F.3d 1524, 1525 (Fed.Cir.1993); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed.Cir.1991); *City of Alexandria v. United States*, 737 F.2d 1022, 1028 (Fed.Cir.1984); *City of Manassas Park v. United States*, 224 Ct.Cl. 515, 633 F.2d 181, 183 (1980).[6] Nonetheless, several recent cases have described this court's refund jurisdiction by making glancing references to section 1346(a)(1). Few in number, these cases invariably involve situations in which the jurisdictional issue was not squarely presented, causing

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Act of 1921, ch. 136, §1310(c), 42 Stat. 311). The accompanying reports again refer to the 1954 legislation as applying only to the district courts. *See* H.R.Rep. No. 83-659 at 11294-5, 11361-2 (1954).

[6] *See also Thomas v. United States*, 56 Fed.Cl. 112, 115 (2003); *Usibelli*, 54 Fed.Cl. at 375 n. 6; *Walther v. United States*, 54 Fed.Cl. 74, 75 (2002); *Overseas Thread Indus., Ltd. v. United States*, 48 Fed.Cl. 221, 223 (2000); *Chaney v. United States*, 45 Fed.Cl. 309, 314 (1999); *Columbia Gas Sys. Inc. v. United States*, 32 Fed.Cl. 318 (1994), *aff'd*, 70 F.3d 1244 (Fed.Cir.1995); *Abruzzo v. United States*, 24 Cl.Ct. 668, 670 (1991); *Tensaw Land & Timber Co., Inc. v. United States*, 14 Cl.Ct. 668 (1988).

all the resulting references to section 1346 therein to be fairly characterized as either *obiter dicta* or otherwise nonprecedential. *See, e.g., Bibbs v. United States,* 230 F.3d 1378 (Fed.Cir.2000) (table); *Lovett v. United States,* 81 F.3d 143, 145 (Fed.Cir.1996); *Kapp v. United States,* 989 F.2d 1202 (Fed.Cir.1993) (table); *Fuselier v. United States,* 63 Fed.Cl. 8, 11 (2004); *Wertz v. United States,* 51 Fed.Cl. 443, 446 (2002). As such, none of these decisions provides any real basis from which to depart from the well-established lineage holding that "[a]lthough this court is mentioned in section 1346(a)(1), ... this is merely a cross-reference to the Tucker Act and ... this court's refund jurisdiction derives from the latter provision." *Usibelli Coal Mine v. United States,* 54 Fed.Cl. 373, 375 n. 6 (2002). And, it is on that firm footing that this court proceeds.[7]

Is there jurisdiction here under section 1491? Defendant answers in the negative, asseverating that "[i]n enacting §6404(e)(1), Congress did not create a judicially enforceable right to an abatement of interest." At first blush, the latter justiciability contention might seem *nihil ad rem pertinet* to the jurisdictional inquiry described in *Eastport.* Indeed, on brief, defendant does not explicitly link its observations regarding the justiciability of interest abatement decisions to the requirements for invoking this court's illegal exaction

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[7] Were this court to conclude that its tax refund jurisdiction derives from section 1346(a)(1), it would follow, *a fortiori,* that the source of this court's jurisdiction over claims less than or equal to $10,000 would not be section 1491, but rather section 1346(a)(2), the so-called Little Tucker Act. Both paragraphs (1) and (2) of section 1346(a) are modified by the precatory language "[t]he district courts shall have original jurisdiction, concurrent with the United States court of Federal Claims." Yet, *no* case in this circuit has ever intimated, let alone held, that this court's jurisdiction in small dollar cases derives from section 1346(a)(2). *See, e.g., Doe v. United States,* 372 F.3d 1308, 1312 (Fed.Cir.2004) (distinguishing the Little Tucker Act and the Tucker Act). The better view is that neither paragraph of section 1346 directly impacts this court's jurisdiction.

jurisdiction under the Tucker Act. Nonetheless, as was explored at oral argument, it appears that such a nexus exists--that, at least in this court, the justiciability inquiry is inextricably intertwined with that of jurisdiction.

A "[d]etermination of jurisdiction starts with the complaint," the Federal Circuit has stated, "which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed.Cir.1997). For an illegal exaction claim, a plaintiff must allege that it "paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Aerolineas Argentinas v. United States* , 77 F.3d 1564, 1572-73 (Fed.Cir.1996) (quoting *Eastport,* 372 F.2d at 1007). But, to list these elements is not to say that the jurisdictional inquiry here is a superficial one, involving a procedural formality, that is, that the mere allegation that something has been taken or retained in violation of a statute is enough to invoke this court's illegal exaction jurisdiction. Rather, just as this court, before exercising its power, is obliged to determine, in a damages case, whether the provision of law invoked by a given plaintiff "'can fairly be interpreted'" as money-mandating, [8] so too, in an illegal

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[8] *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472-73, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (quoting *United States v. Mitchell,* 463 U.S. 206, 217-18, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*)). In *White Mountain,* the Court adumbrated that "[i]t is enough ... that a statute creating a Tucker Act might be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." *Id.* at 473, 123 S.Ct. 1126 (quoting *Mitchell II,* 463 U.S. at 218, 103 S.Ct. 2961). Previously, *Mitchell II* stated: "The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon can fairly

exaction case, the court must ascertain whether the provision of law invoked in a complaint is one upon which a finding of illegality conceivably can be founded. *See, e.g., Aerolineas Argentinas,* 77 F.3d at 1578. [9] Here, not surprisingly, plaintiffs illegal exaction claim is predicated on a violation of section 6404(e)(1) of the Code. But, for that section to support jurisdiction here, it must, as applicable to the year in question, require, in at least some circumstances, that the Secretary abate interest, so as to render his failure to do so "illegal." As will be seen, the latter inquiry is the mirror image of what other courts, construing the prior version of section 6404(e)(1), have described in justiciability terms. Before proceeding, a review of the latter cases is in order.

Prior to 1996, a host of circuits held that interest abatement decisions under section 6404(e)(1) were within the sole discretion of the Secretary and beyond the reach of judicial review. *See Argabright v. United States,* 35 F.3d

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be interpreted as mandating compensation by the Federal Government for the damage sustained." 463 U.S. at 216-17, 103 S.Ct. 2961 (quoting *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)) (internal quotation marks, citation, and footnote omitted);

[9] *See also United States v. Navajo Nation,* 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (applying a similar methodology in analyzing jurisdiction under the Indian Tucker Act). That a requirement similar to that imposed by the Supreme Court in assessing jurisdiction in money-mandating cases would apply to illegal exaction cases should be expected because "[t]he first is founded on statutory authorization; the second on the absence of statutory authorization. One is the flip side of the other." *Aerolineas Argentinas,* 77 F.3d at 1579 (Nies, S.J., concurring). The situation here is distinguishable from those in which a plaintiff fails to demonstrate that a given exaction was contrary to law, which would be a merits determination. *See Aerolineas Argentinas,* 77 F.3d at 1574. Here the question is whether the cited statute could *ever* give rise to a finding of "illegality," a determination that, in this court's view, sounds in jurisdiction.

472, 476 (9th Cir.1994); *Selman v. United States,* 941 F.2d 1060, 1064 (10th Cir.1991); *Horton Homes, Inc. v. United States,* 936 F.2d 548, 554 (11th Cir.1991). The Tenth Circuit's decision in *Selman* typifies the *ratio decidendi* employed in these cases. There, the taxpayers appealed the district court's ruling that: (i) it lacked subject matter jurisdiction to review interest abatement issues; and (ii) that "even if it had jurisdiction, the abatement of interest was committed solely to the discretion of the IRS and not subject to judicial review." *Selman,* 941 F.2d at 1060. The Tenth Circuit affirmed the district court's ruling on the second basis, holding "that the IRS's refusal to abate interest is not subject to judicial review." *Id.* Although the court ruled that the district court had jurisdiction to decide the case under section 1346, *id.* at 1062, it concluded that jurisdiction was limited by the APA and its provisions governing when a court may review agency decisions. Specifically, it ruled that the APA's provisions for judicial review of agency actions did not apply because interest abatement decisions were "committed to agency discretion by law." *Id.* at 1063; *see* 5 U.S.C. §701(a)(2). Focusing on the fact that the statute states that the Secretary "may" abate interest, the Tenth Circuit noted that section 6404(e)(1) failed "to provide ... any substantive standards by which to review the agency's action," further adjudging that the statute's "language, structure and legislative history ... indicate[d] that Congress meant to the commit the abatement of interest to the Secretary's discretion ...." *Id.* at 1063-64.

Selman, Horton Homes and *Argabright* are but the anterior of a phalanx of cases concluding that abatement decisions under the original statute were not subject to

judicial review. [10] In reaching this result, these cases commonly focused first on the statute's use of a permissive term--"the Secretary may abate"--and the absence of any meaningful standard against which to judge the Secretary's exercise of that discretion. As to these points, the Tenth Circuit observed in *Selman,* 941 F.2d at 1064, respectively, that the "statute clearly speaks in permissive, not mandatory language," and that "[a]lthough the statute authorizes the Secretary to abate interest attributable to certain IRS errors or delays, it neither indicates that such authority should be used universally nor provides any basis for distinguishing between the instances in which abatement should and should not be granted." *Id.* at 1063.[11]

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[10] Other cases include: *In re Carlson,* 126 F.3d 915 (7th Cir.1997), *cert. denied,* 523 U.S. 1060, 118 S.Ct. 1388, 140 L.Ed.2d 647 (1998); *Melin v. Comm'r,* 54 F.3d 432, 432-33 (7th Cir.1995); *Bax v. Comm'r,* 13 F.3d 54, 58 (2nd Cir.1993); *Speers v. United States,* 38 Fed.Cl. 197, 202 (1997); *Brahms v. United States,* 18 Cl.Ct. 471 (1989); *Estate of Andrews v. U.S.,* 850 F.Supp. 1279, 1296 (E.D.La.1994); *Maloney v. United States,* 74 A.F.T.R.2d 94-6364, 1994 WL 495853 (E.D.La.1994), aff'd, 62 F.3d 396 (5th Cir.1995) (table); *Cobe v. Internal Revenue Service,* 72 A.F.T.R.2d 93-6185, 1993 WL 496878 (W.D.Mich.1993); *McDonnell v. Peterson,* 71 A.F.T.R.2d 1583, 1992 WL 477014 (N.D.Cal.1992); *Norris & Assocs., P.C. v. United States,* 69 A.F.T.R.2d 92-1097, 1992 WL 133210 (N.D.Ala.1992); *Earnhart v. United States,* 71A A.F.T.R.2d 93-5035, 1990 WL 208693 (W.D.Ark.1990). The court notes that there has also been at least a half dozen unpublished appellate decisions reaching the same conclusion, including two by the Federal Circuit. *See Sceili v. United States,* 39 F.3d 1197, 1994 WL 567011 (Fed.Cir.1994) (table); *Kapp v. United States,* 989 F.2d 1202, 1993 WL 26728 (Fed.Cir.1993) (table).

[11] *See also In re Carlson,* 126 F.3d at 920 ("[A]n abatement by the Secretary [under section 6404(e)(1)] is within his sole authority, and as such it is beyond the scope of judicial review."); *Melin,* 54 F.3d at 432-33 (same); *Argabright,* 35 F.3d at 476 ("§6404(e)(1) leaves courts without 'any basis for distinguishing between the instances in which abatement should and should not be granted.' Lacking 'judicially manageable standards ... for judging how and when [the] agency should exercise its discretion,' we hold that judicial review is not available for agency action

Verifying that the use of the word "may" was intended to be permissive, these cases often contrasted that language in section 6404(e)(1) with the mandatory terms of section 6404(e)(2) and 6404(f), which provide that, in specified circumstances, the Secretary "shall" abate certain other types of interest and penalties. *See, e.g., Horton Homes,* 936 F.2d at 551. [12] Finally, these cases viewed the legislative history of section 6404(e)(1) as confirming their reading of the plain language of the statute, with many courts prominently highlighting that portion of the accompanying

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taken pursuant to 26 U.S.C. §6404(e)(1)."); *Bax,* 13 F.3d at 58 ("[W]e note substantial authority for the view that interest abatement under Section 6404(e)(1) is a discretionary form of relief within the sole authority of the Commissioner and is thereby beyond the scope of judicial review."); *Horton Homes,* 936 F.2d at 552 (statute does not "provide any meaningful standard against which to judge the agency's exercise of discretion"); *Brahms,* 18 Cl.Ct. at 477 ("[i]n drafting §6404(e) as a permissive statute devoid of any directives or instructional guidelines, Congress vested IRS with sole discretion to abate assessments of interest attributable to IRS error or delay"); *Cobe,* 72 A.F.T.R.2d 93-6185 at *2 ("[N]either the statute conferring discretionary authority, nor its legislative history, nor the regulations issues by the I.R.S., provide any meaningful standard against which to judge the agency's exercise of discretion"); *McDonnell,* 71 A.F.T.R.2d 1583 at *3 ("Congress specifically chose to draft the section in permissive language and omitted any standards to be applied in making §6404(e)(1) decisions").

12 As this court observed in *Brahms,* 18 Cl.Ct. at 476–

> The language of 6404, taken in its entirety, demonstrates that Congress carefully distinguished between discretionary and mandatory abatement of interest. Congress used "may" in 6404(e)(1), but also used "shall" in subsection (e)(2) to establish IRS' mandatory duty to abate interest.

See also Selman, 941 F.2d at 1063 (noting that the "structure" of section 6404 indicates that "Congress mean to commit the abatement of interest to the Secretary's discretion"); *Argabright,* 35 F.3d at 475 (same, quoting from *Selman*); *Maloney,* 74 A.F.T.R.2d 94-6364 at *4; *McDonnell,* 71 A.F.T.R.2d 93-1583 at *3.

reports which stated that the statute "gives the IRS the authority to abate interest but does not mandate that it do so."[13] The combined force of these cases is clear: based on the language and structure of the prior version of section 6404(e)(1), as amplified by its legislative history, courts lacked the authority to hear cases challenging the Secretary's refusal to abate interest under that statute.

Although the Federal Circuit has never addressed this issue in a published-- and hence, binding--opinion, this court declines plaintiffs' invitation to skirt the long line of authority construing the prior version of section 6404(e)(1), which includes several decisions in this court. *See, e.g.*,

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[13] This statement appears in S.Rep. No. 99-313, at 208 (1986); H.R. Rep. No. 99-426, at 844 (1986); and H.R. Conf. Rep. No. 99-841, at II-810 (1986), U.S.Code Cong. & Admin.News 1986, pp. 4075, 4898; *see also* Jt. Comm. on Tax'n, "General Explanation of the Tax Reform Act of 1986," 99th Cong., 2d Sess. 1309 (1987). Regarding this legislative history, *Horton Homes* commented–

> In this instance, the legislative history of section 6404(e)(1) is instructive. The various committee reports, as well as the explanation of the staff of the Joint Congressional Committee on Taxation, include the comments that "authority should be available for the IRS to abate the interest independent of the underlying tax liability when errors or delays with respect to ministerial acts have occurred," and that "where an IRS official acting in his official capacity fails to perform a ministerial act," then the proposed legislation "gives the IRS the authority to abate interest but does not mandate that it do so."

Horton Homes, 936 F.2d at 551 (footnotes omitted); *see also Argabright*, 35 F.3d at 476; *Selman*, 941 F.2d at 1064 (nothing in the legislative history serves as "a substantive standard defining when to abate"); *Brahms*, 18 Cl.Ct. at 476 ("The committee reports on the 1986 Tax Reform Act also show that Congress intended to place requests for interest abatement under §6404(e)(1) within the sole discretion of the IRS"); *McDonnell*, 71 A.F.T.R.2d (P-H) 1583 at *3 (the legislative history "implies that the new agency authority was not intended to require abatement, but instead was intended to increase the agency's options for rectifying its errors").

Brahms, supra. To the contrary, the mode for analyzing justiciability in this court is essentially identical to the APA approach employed in most of these prior decisions. Thus, the Federal Circuit has emphasized repeatedly that "judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct." *Murphy v. United States,* 993 F.2d 871, 873 (Fed.Cir.1993), *cert. denied,* 511 U.S. 1019, 114 S.Ct. 1402, 128 L.Ed.2d 75 (1994); *see also Cons. Edison Co. of N.Y. v. O'Leary,* 117 F.3d 538, 545 (Fed.Cir.1997), *cert. denied,* 522 U.S. 1108, 118 S.Ct. 1036, 140 L.Ed.2d 103 (1998); *Voge v. United States,* 844 F.2d 776, 780 (Fed.Cir.1988). Applying this analysis, the court believes that the language, structure and legislative history of section 6404(e)(1), as originally enacted, all firmly lead to the conclusion that the Secretary's decisions under that section were not judicially reviewable.[14] Accordingly, were this court faced with the question whether subject matter jurisdiction lies for a claim based upon the original version of section 6404(e)(1), it would readily conclude that such jurisdiction is lacking because section 6404(e)(1) cannot ever give rise to an "illegal" exaction within the compass of section 1491.

But, of course, we are not dealing with the original version of the statute. The question then is whether the amendments made by Congress in 1996 significantly alter

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[14] The situation presented thus is distinguishable from those in which the term "may" has been construed to mean "shall." *See, e.g., Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,* 529 U.S. 193, 198, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000); *see also Anderson v. Yungkau,* 329 U.S. 482, 485, 67 S.Ct. 428, 91 L.Ed. 436 (1947) ("when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense--the one act being permissive, the other mandatory"); *Huston v. United States,* 956 F.2d 259, 262 (Fed.Cir.1992) ("When, within the same statute, Congress uses both 'shall' and 'may,' it is differentiating between mandatory and discretionary tasks.").

the legal landscape here. Plaintiffs assert that they do--the court concludes that they do not.

The situation here is not quite what the French novelist Karr had in mind when he penned the classic line "*plus ça change, plus c'est la même chose*"-- because here things are the same largely because nothing has changed. For one thing, as applicable to this case, the 1996 amendments neither alter the language nor the structure of the statute. The court is confronted with the same "may abate" language that was in the original version, which language still contrasts with the "shall abate" language employed in other parts of section 6404. And, at least in the version of section 6404(e)(1) applicable here--in which the word "unreasonable" is not yet included--the statute still does not give the slightest clue as to how a court might distinguish between permissible and impermissible exercises of the Secretary's discretion. [15] These are, of course, the very features that led more than a dozen courts to conclude that the prior statute did not provide for judicial review. Nor is it any answer for plaintiffs to contend, in cart-before-the-horse fashion, that this court simply should employ some form of "arbitrary and capricious" review. Such review requires the court to "consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"[16] – here such factors are conspicuously absent. Indeed, similar arguments, premised upon the presumed

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[15] In this case, the court is not called upon to resolve, and takes no position as to, whether the addition of the word "unreasonable" into the statute would lead to a different result.

[16] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (citations omitted); *see also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057-58 (Fed.Cir.2000).

generic availability of "arbitrary and capricious" review under the APA, were negatived by the courts that considered the prior version of the statute. *See, e.g., Selman,* 941 F.2d at 1062-63.

Now, of course, one thing has changed somewhat–Congress undeniably has expressed the intention that some court have jurisdiction to review abatement decisions. But, not this court. Nonetheless, plaintiffs aver that, overall, the tenor of the legislative history of the 1996 Act is different than that accompanying the original 1986 version of the statute, and reflects an intent by Congress that abatement decisions be reviewable by courts other than the Tax Court. *Per contra.* The House Report accompanying the 1996 Act begins by flatly announcing that "Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." H.R.Rep. No. 104-506, at 28 (1996), U.S.Code Cong. & Admin.News 1996, pp. 1143, 1151. While that report continues that "[t]he Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS' failure to abate interest with respect to certain taxpayers," it hastens to add that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS' failure to abate interest." *Id.* Accordingly, if anything, the legislative history of the 1996 Act indicates that Congress went to great pains to foreclose any assertion that, in affording jurisdiction to the Tax Court, it was *sub silentio* altering the prior decisional law involving justiciability. *See Hadley v. Comm'r,* 819 F.2d 359, 360 (2nd Cir.1987) (holding similar "no inference" language in legislative history indicates lack of intent to change the impact of the prior law).

Any notion that, without express statutory language, this legislative history was intended to render abatement decisions justiciable in courts other than the Tax Court is further undercut by H.R.Rep. No. 106-566 (2000), which

describes then "present law" regarding judicial review of abatement decisions in the following terms–

> Where abatement of interest is sought separate from any redetermination of tax the availability of judicial review depends upon the basis on which abatement is sought. If the IRS is required to abate the interest, judicial review is available to determine if the facts exist that mandate abatement. The Taxpayer Bill of Rights 2 specifically granted jurisdiction to the Tax Court to review for abuse of discretion any decision by the IRS not to abate interest that is attributable to unreasonable error or delay by Service employees in the performance of a ministerial or managerial act, effective for requests for abatement filed after July 30, 1996.
>
> Otherwise, review of the Secretary's failure to use his or her discretion to abate interest may not be available. The courts have held that judicial review of the IRS' failure to use its discretion to abate interest is generally not available, unless jurisdiction is specifically granted by statute or a standard for review has been established.

Id. at 32 (footnotes omitted). Indeed, the language of this report is hauntingly reminiscent of that employed in the 1986 reports in stating that section 6404(e)(1) "authorizes, but does not require the abatement of interest," further explaining that "[a]batement is at the discretion of the Secretary." *Id.* at 29; *see also Davies v. United States,* 124 F.Supp.2d, 717, 721 (D.Me.2000).[17]

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[17] While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, *Teamsters v. United States,* 431 U.S. 324, 354, n. 39, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), such views are entitled to "significant weight," *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), particularly "when the precise intent of the enacting Congress is obscure," *Seatrain Shipbuilding Corp.*

Accordingly, review of this legislative history fails to persuade the court that it now possesses the jurisdiction to review abatement decisions. Certainly nothing in this legislative history suggests that Congress intended to overrule the prior line of cases--indeed, as one district court put it, "[i]f anything, the legislative history indicates the opposite: that Congress believed and intended that the [prior] line of cases would be untouched." *Davies,* 124 F.Supp.2d at 721.[18] Even were this legislative history more clearly supportive of plaintiffs' position, the court would be hesitant to jettison wholesale the prior cases solely on that basis, without some hint, to that effect, in the statutory language. In fact, it is more likely that had Congress intended to work such a fundamental change in jurisdiction or justiciability, it would have done so expressly [19] –as it did

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v. Shell Oil Co., 444 U.S. 572, 596, 100 S.Ct. 800, 63 L.Ed.2d 36 (1980).

[18] Other cases reaching the same conclusion as to the 1996 version of the statute include *Carroll v. United States,* 198 F.Supp.2d 328, 360 (E.D.N.Y.2001), *vacated on other grounds,* 339 F.3d 61 (2nd Cir.2003); *Dogwood Forest Rest Home, Inc. v. United States,* 181 F.Supp.2d 554, 558 (M.D.N.C.2001); *Henderson v. United States,* 95 F.Supp.2d 995, 1003-04 (E.D.Wis.2000); *see also Weiner v. United States,* 255 F.Supp.2d 624, 658-62 (S.D.Tex.2002); *but see Miller v. Comm'r,* 310 F.3d 640, 642-43 (9th Cir.2002).

[19] Notably, one of the earliest versions of the bill that became the 1996 Act would have done this expressly. Thus, as introduced, section 5201 of H.R. 4210, 102d Cong. (1992), would have stricken the "may abate" language in section 6404(e)(1) and inserted in lieu thereof the language "shall abate (or refund)." This legislation, however, did not pass. Then, section 301(b) of S. 258, 104th Cong. (1995), would have amended section 6404(e)(1) to indicate that the Secretary "shall abate the assessment of such interest until the date demand for payment is made in the case of a taxpayer described in section 7430(c)(4)(A)(iii)." But, this provision also did not pass. Instead, following criticism of these provisions by government officials at a Congressional hearing, *see* "Exploring the Development of Taxpayer Bill of Rights II Legislation," Hearings Before the Subcomm. on Oversight of the Comm. on Ways and Means, 104th

in the case of the Tax Court--and not, as plaintiff asserts, through a tortured web of inferences and export[illegible] standards. *See Jama v. Immigration and Customs Enforcement,* --- U.S. ----, ----, 125 S.Ct. 694, 700, 160 L.Ed.2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). To conclude otherwise would not only be inconsistent with the rationale underlying this court's illegal exaction jurisdiction and the decisions construing the prior version of §6404(e)(1), but would be particularly unwarranted given the Supreme Court's repeated admonition that waivers of sovereign immunity "must be 'construed strictly in favor of the sovereign.' " *United States v. Nordic Village, Inc.,* 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (quoting *McMahon v. United States,* 342 U.S. 25, 27, 72 S.Ct. 17, 96 L.Ed. 26 (1951)).[20]

Cong. 30, 35-36, 44, 61-62, 127 (March 24, 1995), the bill that emerged from the Ways and Means Committee was H.R. 2337, 104th Cong. (1995), which contains essentially the same language ultimately enacted. This history suggests that Congress knew how to create a mandatory provision, but chose not to.

[20] Nor is this result, as plaintiffs contend, condemned by perverse consequences. In this regard, plaintiffs note that the Tax Court remedy adopted by Congress is limited to individuals meeting the net worth requirements of section 7430(c)(4)(A)(ii) of the Code. The latter provision of the Code incorporates language from 28 U.S.C. §2412(d)(2)(B) and thereby generally limits the award of attorney's fees in tax cases to individuals with net worths less than $2 million and entities with values less than $7 million. By invoking this provision, Congress similarly limited review of abatement decisions in the Tax Court. Plaintiffs suggest, as the Fifth Circuit did in *Beall v. United States,* 336 F.3d 419 (5th Cir.2003), that Congress could not have intended to limit review of abatement decisions in this fashion, but instead must have intended

In arguing to the contrary, plaintiffs rely heavily on *Beall, supra,* in which the Fifth Circuit concluded that district courts may review abatement decisions under the new version of section 6404. Preliminarily, the Fifth Circuit reaffirmed the APA analysis employed in *Horton Homes, Selman* and *Argabright,* under which judicial review may not be exercised where either a statute precludes it or the reviewed action is committed to agency discretion. *Id.* at 426. It went so far as to observe that "were we to address today the same issue that faced those courts, we would most likely, and for the same reasons, conclude that judicial review of the Secretary's decision to deny an abatement request is barred." *Id.* Nonetheless, the court found that "[t]he statutory landscape in which we address the Bealls' claim for interest abatement is ... substantially different." *Id.* In this regard, it explained:

> Having reviewed those changes, we find that in amending section 6404, Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion.... We need look no further for support for this conclusion than the simple addition of section 6404(h) granting jurisdiction to the Tax Court review the decision. Indeed, the vesting of jurisdiction in the Tax Court to review interest abatement challenges can be given no meaning other than that the abatement decision is no longer committed solely to agency discretion. Accordingly, we cannot say that either section 701(a)(2) of the APA, or the absence of manageable standards of

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that individuals with greater means be able to seek review in the district courts or this court. But, there is utterly no evidence of this. Indeed, as illustrated by the attorney fee provisions of section 7430 themselves, this is not the first time that Congress made the availability of certain recoveries dependent upon the economic status of the claimant.

> review generally, any longer precludes judicial review of the denial of a request for abatement.

Id. at 426-27 (citations omitted). Along this decisional path, the Fifth Circuit made short shrift of the legislative history accompanying the 1996 Act. It discounted the House Report's reference to prior law, *i.e.*, "[f]ederal courts generally do not have jurisdiction to review the IRS' failure to abate interest," as involving a "misuse" of the term "jurisdiction," noting that prior cases had dismissed such claims not based on jurisdictional, but rather justiciability, grounds. *Id.* at 427, n. 11. And it discredited the same report's "no inference is intended ..." statement, finding this language to be contradicted by Congress' actions in granting the Tax Court jurisdiction, which, in the Fifth Circuit's view, inferred an intent to expand review to other courts. *Id.* at 428, n. 13. Summarizing, the Fifth Circuit concluded that the Congress had "removed the impediment to district court review identified by *Horton Homes* by indicating that the IRS' decisions on requested interest abatement were not merely matters of administrative grace and that denials were subject to *substantive* challenge." *Id.* at 430 (emphasis in original).

With all due respect, this court disagrees. *Beall* essentially collapsed the twin prongs of the justiciability determination into one, effectively concluding that the Congress intended review by all courts simply because it intended to provide review in a single court, namely, the Tax Court. As the legislative history of the 1996 Act reveals, Congress was aware that courts had previously interpreted the language and structure of section 6404(e)(1) as evincing its intent to preclude judicial review.[21] Yet, as noted above,

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[21] The court disagrees with the Fifth Circuit's characterization of this legislative history as incorporating a "misuse of the term 'jurisdiction.'" *Beall*, 336 F.3d at 428 n. 11. To be sure, many decisions concluded that section 1346 affords district courts jurisdiction over abatement claims.

Congress not only failed to alter the permissive language and structure of that section, but also explicitly cautioned, via legislative history, that it did not intend conferring jurisdiction on the Tax Court to be a basis for inferring that review jurisdiction should be afforded elsewhere. That inference, of course, is exactly the one that the Fifth Circuit indulged. At all events, the Fifth Circuit never directly addressed the second prong of the justiciability inquiry, *to wit,* whether the statute contains tests and standards by which to measure the Secretary's decision. It merely assumed--and wrongly so--that in conferring jurisdiction on the Tax Court, Congress had created such benchmarks. But, the amended statute, even as fully effective, confers only somewhat more guidance in this regard than its predecessor, leaving courts still to deal with the permissive language in the statute and to ponder the circumstances under which the Secretary might be viewed as abusing his discretion. And even that little guidance is wholly lacking in the less fulsome version of the statute applicable here, which, unlike that considered in *Beall,* does not include the "substantive" modifications made to section 6404(e)(1), *e.g.,* the addition of the word "unreasonable." In short, *Beall*

But, those same courts all ultimately found that the APA barred them from exercising that jurisdiction. While, in technical parlance, the latter situation obviously involves justiciability, it is not so far-fetched to describe it as a situation in which a court does not have jurisdiction. Indeed, despite criticizing the House Report's discussion of "present law," even the Fifth Circuit admitted that "Congress was aware of the *Horton Homes* line of cases." *Id.* at 427. Moreover, if the House Report meant to refer to "justiciability" instead of "jurisdiction" in its statement of "present law," then one must assume that it made the same "mistake" when it indicated that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS' failure to abate interest." By comparison, the Fifth Circuit interpreted the first reference to "jurisdiction" as meaning justiciability, but the second as truly meaning "jurisdiction." In court's view, this analysis of this legislative history is a *non sequitur.*

does not demonstrate that the amended version of the statute, as applicable in this case, affords this court jurisdiction.[22]

Perhaps not surprisingly, outside the Fifth Circuit, *Beall* has received a mixed reception. While the district court in *Leiter v. United States,* 2004 WL 303210 (D.Kan.2004), summarily adopted the Fifth Circuit's reasoning, a second district court, in *Ballhaus v. Internal Revenue Service,* 341 F.Supp.2d 1145 (D.Nev.2004), flatly rejected it. The latter court preliminarily observed that

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[22] Much the same analysis disposes of plaintiff's assertion, also based on *Beall,* that in authorizing review of abatement decisions by the Tax Court, Congress must have believed that the amended section 6404(e)(1) somehow constrained the Secretary's exercise of discretion. For one thing, it is important to note that section 6404(h) applies to all the abatement provisions under section 6404, including several clearly phrased in mandatory terms with meaningful standards, *e.g.,* 6404(e)(2). Thus, holding that section 6404(h) does not effectuate review of denials under section 6404(e)(1) would not render it a nullity. But, even if Congress abstractly intended section 6404(e)(1) denials to be reviewable, that does not mean that it equipped courts to conduct such reviews by supplying meaningful standards by which to evaluate the Secretary's exercise of discretion. That such standards still may be absent is nowhere better illustrated than in the numerous Tax Court's cases involving section 6404(e)(1), almost all of which reject abatement claims based upon other statutory requirements, *i.e.,* that claimed delay did not relate to a "ministerial" action. *See, e.g., Corson v. Comm'r,* 123 T.C. 202, 2004 WL 1789898 (2004). Conspicuously, none of the Tax Court's cases enumerates the standards or factors that, under *Overton Park, supra,* should be used to evaluate whether a given delay is arbitrary and capricious. *See also Heckler v. Chaney,* 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"). Moreover, as in *Beall,* most of these Tax Court decisions involve the version of section 6404(e)(1) to which the modifier "unreasonable" has been added, *i.e.,* "unreasonable delays." That is not the case here, leaving plaintiffs to argue--unconvincingly--that the exact language previously identified as posing major justiciability hurdles, now is no problem.

"[p]ast circuit court decisions that found the APA precluded judicial review of abatement decisions relied upon the language, structure, and legislative history of the provision, all of which demonstrated congressional intent to commit the abatement of interest to the agency's discretion." *Id.* at 1149 (citations omitted). In contradistinction to *Beall,* the court found that since the time of these decisions, "no meaningful change in the language, structure, or legislative history of the statute would render obsolete the ... analyses regarding jurisdiction in the federal district courts." *Id.* In this regard, it noted--

> The statute continues to speak in the 'permissive, not mandatory' terms noted in *Selman:* the statute language specifies that the Secretary 'may abate' interest assessments caused in whole or part by IRS error, language that contrasts with the phrasing of the next paragraph in the statute, which states that the Secretary 'shall abate' the assessment of all interest on any erroneous refund checks. *Id.* The statutory language does not indicate a right to abatement or direct the Secretary to provide an abatement under specific circumstances. Consequently, the very similar statutory language on which the Tenth and Ninth Circuit previously relied in holding that abatement decisions were committed to agency discretion by law remains relevant to this Court's analysis.

Id. Moreover, unlike the Fifth Circuit, the district court read the 1996 legislative history as "indicat[ing] Congress' intent to avoid changing any aspect of the law regarding judicial review of abatement issues, with the exception of adding review under a tax court," noting that Congress "was careful to do no more." *Id.* at 1150. In sum, it concluded that "neither the language of the statute nor the congressional record indicate an intent to remove §6404

from the ambit of those agency actions not subject to judicial review in the district court." *Id.* at 1149.

Based on the foregoing, the court finds that the 1996 amendments to section 6404, insofar as they are applicable here, do not provide a legal basis from which to conclude that the retention of plaintiffs' funds was an illegal exaction within the meaning of this court's Tucker Act jurisdiction. Accordingly, this court lacks jurisdiction to consider whether the Secretary erroneously denied plaintiffs' interest abatement claim.[23]

III. CONCLUSION

This court need go no farther. [24] For the foregoing reasons, the court concludes that it lacks jurisdiction over

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[23] Even were this court wrong to frame this conclusion in jurisdictional terms, at best, the holding here would be that the court had jurisdiction, but could not exercise it under more traditional justiciability principles. "Even where a court possesses jurisdiction to hear a claim," the Federal Circuit has explained, "it may not do so in cases where the claim presents a nonjusticiable controversy." *Adkins v. United States,* 68 F.3d 1317, 1322 (Fed.Cir.1995); *see also Roth v. United States,* 378 F.3d 1371, 1385 (Fed.Cir.2004); *Murphy,* 993 F.2d at 872. Thus, the Federal Circuit has stated that a controversy is justiciable "only if it is 'one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.' " *Voge,* 844 F.2d at 780 (quoting *Greene v. McElroy,* 254 F.2d 944, 953 (D.C.Cir.1958)). Accordingly, the same analysis that leads to the conclusion that section 6404(e)(1), as applicable herein, does not support an illegal exaction claim, also would lead to the conclusion that review of the Secretary's determination is not reviewable on pure justiciability grounds.

[24] Defendant has also argued that the Tax Court's jurisdiction over abatement claims is exclusive, thereby suggesting that the 1996 Act withdrew any jurisdiction that this court might otherwise have. Because the court concludes that it lacks jurisdiction over this case, it need not address this contention.

plaintiffs' complaint. The Clerk shall dismiss plaintiffs' complaint.

IT IS SO ORDERED.

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(4)

No. 06-376

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Did the grant of selective, limited jurisdiction give the Tax Court exclusive jurisdiction over all 26 U.S.C. §6404(e)(1) claims, deny all relief for many taxpayers, and repeal by implication the existing 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction of the district courts and the Court of Federal Claims?

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Statutory Provisions 1

Statement of the Case 1

Summary of the Argument 10

Argument 11

I. The District Courts and Claims Court Have Concurrent §1346(a) Jurisdiction Over §6404(e)(1) Refund Claims 11

A. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest 13

B. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest Accrued as a Result of IRS Errors or Delays 13

C. Sections 1346(a)(1) and 7422(a) Encompass §6404(e)(1) Abatement Refund Claims 14

D. The Trial Court Erroneously Disregarded the Claims Court's §1346(a)(1) Jurisdiction 15

II. The Claims Court also has §1491(a)(1) Jurisdiction Over §6404(e)(1) Claims 16

A. Suits for Refund Under the Revenue Laws are Encompassed Under §1491(a)(1) 17

B. Section 6404(e)(1) is Money Mandating ... 18

III. The Fifth and Federal Circuit Split Destroys the Integrated Jurisdictional Plan Between the District Courts and the Claims Court 21

IV. The Nature of Tax Court's Jurisdiction 22

A. Tax Court Jurisdiction Must Be Specifically Set Out in the Tax Code ... 22

B. The Tax Court's Only General Jurisdiction is Over Deficiencies 22

C. Section 6213 Jurisdiction Does Not Include Interest or Refund Determinations 23

D. An Express Grant in the Tax Code Was Required to Establish Tax Court Jurisdiction Over §6404(e)(1) Claims 25

V. The Tax Court Does Not Have Exclusive Jurisdiction Over §6404(e)(1) Claims 25

A. The Plain Language of §6404(h) Does Not Vest the Tax Court With Exclusive Jurisdiction 26

B. Implied Repeal of Existing Federal Court Jurisdiction is Disfavored .. 28

C. Exclusive Jurisdiction is Inconsistent with the Legislative Scheme for Tax Controversies 29

D. The Legislative History Does Not Support Exclusive Tax Court Jurisdiction 32

E. Assumed Expertise is No Basis on Which to Infer Exclusive Jurisdiction .. 34

VI. The Claims Court Erroneously Followed Pre-TBOR2 Cases to Hold That §6404(e)(1) is Totally Discretionary Because The Provision Was Not Judicially Manageable 35

A. Pre-TBOR2 Cases Erroneously Relied on the APA 35

B. Early §6404(e)(1) Cases Concluded Judicial Review Was Precluded 36

C. TBOR2 Invalidates All Prior Grounds for Supporting Total IRS Discretion 37

1. TBOR2 Adopts the Common Law Standard of Review 37

2. The Statute is Not Too General 38

3. The "May" Versus "Shall" Distinction is Now Moot 40

D. Total IRS Discretion Is Rare 41

VII. The Federal Circuit's Decision Denies Taxpayer's Due Process 43

A. The Federal Circuit's Interpretation Would Violate the Constitutional Due Process Rights of Many Taxpayers 44

B. "Claim-Splitting" is Prohibited 48

C. Exclusive Tax Court Jurisdiction Would Leave Taxpayers at the Mercy of the IRS .. 50

Conclusion 50

TABLE OF AUTHORITIES

Constitutional Provisions: Page

United States Constitution, Amendment 1 47
United States Constitution, Amendment 14 47
United States Constitution, Amendment 5 ..... 21, 47
United States Constitution, Amendment 6 47
United States Constitution, Article I 22
United States Constitution, Article IV 47

Cases:

508 Clinton St. Corp. v. Commissioner,
89 T.C. 352 (1987) 3, 25
Adams v. Carlson,
488 F.2d. 619 (7th Cir. 1973) 47
Advanced Data Concepts, Inc. v. United States,
216 F.3d 1054 (Fed. Cir. 2000) 38
Aerolineas Argentinas v. United States,
77 F.3d 1564 (Fed.Cir., 1996) 20
Am. Pelagic Fishing Co. v. United States,
379 F.3d 1363 (Fed. Cir. 2004) 47
Ammex, Inc. v. United States,
384 F.3d 1368 (Fed.Cir. 2004) 16
Anderson v. John L. Hayes Constr. Co.,
243 N.Y. 140, 153 N.E. 28 (1926) 17
Argabright v. United States,
35 F.3d 472 (9th Cir. 1994) 3, 36, 37, 42
Asciutto v. Commissioner,
T.C. Memo.1992-564,
affd. 26 F.3d 108 (9th Cir.1994) 23
Atkins v. United States,
556 F.2d 1028 (Ct.Cl. 1977) 47
Barlow v. Commissioner,
301 F.3d 714 (6th Cir. 2002) 48
Bartelma v. Commissioner,
T.C.Memo. 2005-64 40

Barton v. Commissioner,
97 T.C. 548 (1991) 24
Bartschi v. Tracy
2001-2 U.S.T.C. ¶50,672,
2001 WL 1338795 (D. Ariz. 2001) 27
Bates Mfg. Co. v. United States,
303 U.S. 567 (1938) 21
Bax v. Commissioner,
13 F.3d 54 (2nd Cir. 1993) 3, 4, 23, 25
Bayou Fleet, Inc. v. Alexander,
234 F.3d 852 (5th Cir. 2000) 47
Beall v. United States,
170 F.Supp.2d 709 (E.D. Tex. 2001) 4
Beall v. United States,
335 F.Supp.2d 743 (E.D. Tex. 2004) 4, 9
Beall v. United States,
336 F.3d 419 (5th Cir. 2003) ("*Beall*") 1, 7-9, 12-14, 21, 26, 32, 44
Beall v. United States,
467 F.3d 864 (5th Cir. 2006) ("*Beall* II") 9
Benedict v. Sec. of Dept. of H.H.S.,
29 Fed.Cl. 587 (1993) 48
Boddie v. Conn.,
401 U.S. 371 (1971) 47
Bounds v. Smith,
430 U.S. 817 (1977) 47
Bourekis v. Commissioner,
110 T.C. 20 (1998) 50
Brahms v. United States,
18 Cl.Ct. 471 (1989) 35-37, 41
Brinkerhoff-Faris Trust & Savs. Co. v. Hill,
281 U.S. 673 (1930) 47
Burlington No. R.R. v. Okla. Tax Comm.,
481 U.S. 454 (1987) 15
Butler v. Commissioner,
114 T.C. 276 (2000) 42, 43

Calif. Motor Transp. v. Trucking Unlimited,
404 U.S. 508 (1972) 47
Carriso v. United States,
106 F.2d 707 (9th Cir.1939) 20
Chambers v. Baltimore & Ohio RR Co.,
207 U.S. 142 (1907) 47
Charlton v. Commissioner,
114 T.C. 333 (2000) 43
Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 36
Commissioner v. Gooch Milling & Elevator Co.,
320 U.S. 418 (1943) 3
Commissioner v. Sunnen,
333 U.S. 591 (1948) 49
Continental Equities, Inc. v. Commissioner,
551 F.2d 74 (5th Cir. 1977) 22
Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 28
Crocker v. United States,
37 Fed.Cl. 191 (1997) 21
DeWitt v.Pail,
366 F.2d 682 (9th Cir. 1966) 47
Doe v. United States,
100 F.3d 1576 (Fed. Cir. 1996) 18
Eastport S.S. Corp. v. United States,
178 Ct.Cl. 599, 372 F.2d 1002 (1967) ... 15, 20, 21
Estate of Baumgardener v. Commissioner,
85 T.C. 445 (1985) 24
Estate of Wenner,
116 T.C. 284 (2001) 22
Eversharp, Inc. v. United States,
129 Ct.Cl. 772, 125 F.Supp. 244 (1954) 20
Fehlhaber v. Fehlhaber,
681 F.2d 1015 (5th Cir. 1982) 47
Fernandez v. Commissioner,
114 T.C. 324 (2000) 43

Finley v. United States,
612 F.2d 166 (5th Cir.1980) 49
Flora v. United States,
357 U.S. 63 (1958) (*Flora* I) 12, 17, 31
Flora v. United States,
362 U.S. 145 (1960) ("*Flora* II") . 13, 14, 29, 30, 49
Foreman v. United States,
60 F.3d 1559 (Fed.Cir. 1995) 16
Freytag v. Commissioner,
501 U.S. 868 (1991) 22
Fuselier v. United States,
63 F.3d 8 (Fed.Cl. 2004) 16
Georgia v. Pennsylvania R. Co.,
324 U.S. 439 (1945) 28
Goblirsch v. Commissioner,
T.C.Memo. 2005-78 40
Golsen v. Commissioner,
54 T.C. 742 (1970),
aff'd, 445 F.2d 985 (10th Cir.),
cert. denied, 404 U.S. 940 (1971) 35
Greene-Thapedi v. Commissioner,
126 T.C. 1 (2006) 24, 27
Halpern v. Commissioner,
96 T.C. 895 (1991) 22
Heasley v. Commissioner,
902 F.2d 380 (5th Cir. 1990) 38, 41
Hinck v. United States,
446 F.3d 1307 (Fed.Cir.2006)("*Hinck*") 1, 3, 6, 29, 44
Hinck v. United States,
64 Fed.Cl. 71 (2005) 1, 2, 7, 8
Ho v. Commissioner,
T.C.Memo 1998-363 25
Horton Homes, Inc. v. United States,
936 F.2d 548 (11th Cir. 1991) ... 2, 3, 12, 13, 28, 32,
35-37, 39, 40, 42
I.R.S. v. Blais,
612 F.Supp. 700 (D.Mass.1985) 46

In re Mira,
245 Bankr. 788 (Bankr. M.D. Pa. 1999) 42
In re Super Van, Inc.,
92 F.3d 366 (5th Cir.1996) 48
Jackson v. Stinnett,
102 F.3d 132 (5th Cir.1996) 28
Johnson v. Avery,
393 U.S. 483 (1969) 47
Kapp v. United States,
989 F.2d 1202 (Table),
1993 WL 26728 (Fed.Cir. 1993) 2, 3, 13, 16
Kraemer v. United States,
2002 WI 575791 (S.D.Tex., 2002) (unpublished) . 8
Ledford v. United States,
297 F.3d 1378 (Fed.Cir. 2002) 16
Lee v. Commissioner,
113 T.C. 145 (1999) 38
Leffert v. Commissioner,
81 T.C.M. (CCH) 1093 (2001) 2, 34, 39
Lincir v. Commissioner,
115 T.C. 293 (2000) 24
Lovett v. United States,
81 F.3d 143 (Fed.Cir. 1996) 16
LTV Corp. v. Commissioner,
64 T.C. (1975) 23
Lunsford v. Commissioner,
117 T.C. 183 (2001) 42
Mailman v. Commissioner,
91 T.C. 1079 (1988) 41
Mallow v. United States,
161 Ct.Cl. 446, 1963 WL 8503 (1963) 20
McBryde v. United States,
299 F.3d 1357 (Fed. Cir. 2002) 18
Melin v. Commissioner,
54 F.3d 432 (7th Cir. 1995) 25
Morton v. Mancari,
417 U.S. 535 (1974) 28, 29

Naftel v. Commissioner,
85 T.C. 527 (1985) 22
New York Life Ins. Co. v. United States,
118 F.3d 1553 (Fed.Cir. 1997) 19, 20
Norman v. United States,
429 F.3d 1081 (Fed.Cir.2005) 21
Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 34
Pennsylvania v. Finley,
481 U.S. 551 (1987) 47
Phillips v. Commissioner,
283 U.S. 589 (1931) 48
Poretto v. Usry,
295 F.2d 499 (5th Cir. 1961) 31
Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,
485 U.S. 495 (1988) 33
Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 29
Ratzlaf v. United States,
510 U.S. 135 (1994) 33
Roberts v. United States,
242 F.3d 165 (Fed.Cir. 2001) 16
Rogers v. Desiderio,
58 F.3d 299 (7th Cir. 1995) 49
Rotenberry v. Commissioner,
847 F.2d 229 (5th Cir. 1988) 31
Selman v. United States,
941 F.2d 1060 (10th Cir. 1991) ... 2, 3, 12, 35-40, 42
Silver v. Cormier,
529 F.2d 161 (D.C.Colo. 1976) 47
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 33
United States v. Bajakajian,
524 U.S. 321 (1998) 14
United States v. Borden Co.,
308 U.S. 188 (1939) 29

United States v. Dalm,
494 U.S. 596 (1990) 12
United States v. Emery, Bird, Thayer Realty Co.,
237 U.S. 28 (1915). 17
United States v. Estate of Romani,
523 U.S. 517 (1998) 34
United States v. Menasche,
348 U.S. 528 (1955) 15
United States v. Mitchell,
463 U.S. 206 (1983) 17, 18, 26
United States v. Rodgers,
461 U.S. 677 (1983) 19, 41
United States v. Shanbaum,
10 F.3d 305 (5th Cir. 1994) 49
United States v. Testan,
424 U.S. 392 (1976) 18
United States v. Vanness,
85 F.3d 661 (D.C.Cir.1996) 33
United States v. Williams,
514 U.S. 527 (1995) 12, 14, 15
Weiner v. United States,
213 F.Supp.2d 728 (S.D.Tex., 2002) 8
Weiner v. United States,
255 F.Supp.2d 624 (S.D.Tx 2002) 6
Weiner v. United States,
389 F.3d 152 (5th Cir. 2004) ("*Weiner*") .. 4, 6, 8, 24, 44
Wertz v. United States,
51 Fed. Cl. 443 (Fed.Cl. 2002) 16
White v. Commissioner,
95 T.C. 209 (1990) 23
Winn-Dixie Stores, Inc. & Subs. v. Commissioner,
110 T.C. 291 (1998) 24
Wood v. United States,
16 Pet. 342, 10 L.Ed. 987 (1842) 28
Xechem Pnatl, Inc. v. Univ. of Texas,
382 F.3d 1324 (Fed.Cir. 2004) 47

Statutes: Page

Administrative Procedure Act ("APA"), Title 5, U.S.C.
codified at 5 U.S.C. §§701-706 36
§§ 701-706 36
§ 706 38

Internal Revenue Code, Title 26, U.S.C.
§ 2412(d)(1)(B 45
§ 6015(f) 42, 43
§ 6110(f)(3) 27
§ 6110(f)(4) 27
§ 6110(j) 26
§ 6211 23
§ 6212 23
§ 6213 ..... 23, 24
§ 6213(a) 22, 23, 32
§ 6228(b) 27
§ 6230(c) 27
§ 6320 ..... 27, 42
§ 6330 42
§ 6330(d) 24, 27
§ 6404(e) 1-3, 5-11, 14, 16, 18, 19, 21, 25, 28, 32, 34-39, 41, 43-47, 49, 50
§ 6404(h) 5, 8, 21, 25, 26, 29, 40, 44, 47, 50
§ 6512(b) 24
§ 6532(a)(1) 50
§ 6601(e) 23
§ 6601(e)(1) 13
§ 6621(c) 24
§ 6659 ..... 38, 41
§ 6660 ..... 38, 41
§ 6661 ..... 38, 41
§ 7122 42
§ 7422(a) 6, 7, 9, 12-14, 16, 27, 29, 36, 46, 50
§ 7422(h) 27, 28
§ 7430(a)(1) 45
§ 7430(a)(2) 45

§ 7430(c)(4)(A) 45, 46
§ 7430(c)(4)(A)(ii) 44
§ 7441 22
§ 7442 ..... 3, 22
§ 7481(c) 3, 24
§ 7482(a)(1) 22, 26, 28

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1346(a)(1) ... 2, 6-9, 11-16, 21-23, 26, 27, 29, 30, 35, 36, 46
28 U.S.C. § 1491(a) ("the Tucker Act") .. 2, 6-8, 15-21, 23, 26, 29, 35, 36, 41, 46
28 U.S.C. § 2412(d)(2)(B) 44

Report of the Committee on Ways and Means of the House of Representatives on H.R.Rep. 3838, 99th Cong., 1st Sess. 844, 844-45 (1985) 39

Omnibus Budget Reconciliation Act of 1989, §7721(b), Pub.L. 101-239, 103 Stat. 2106, 2399, effective with respect to returns the due date for which is after December 31, 1989 24

Taxpayer Bill of Rights II ("TBOR2") ... 5, 25, 35-37, 39, 41, 42
P.L. 104-168, §301(a)(1)-(2) of TBOR2. 39
P.L. 104-168, §301(c) of TBOR2. 39

Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 ..... 5, 42

Taxpayer Bill of Rights 2000 H.R.Rep. No. 106-566, at 32 (2000) 33

P.L. 107-134, §112(d)(1) 5

Rules and Regulations: Page

FRCP Rule 12(b)(6) 9

Treas. Reg. §301.6330-1T(F)(2) 27

Treas. Reg. §301.6404-2(b)(2) 2, 34

Treas. Reg. §301.6404-2T(b)(1) 2, 34, 40

Legislative History:

H.R. 4163 33

H.R. Rep. No. 104-506, at 28 (1996) 32

H.R.Rep. 99-426, 1986-3 C.B. Vol. 2 844-5
(Dec. 7, 1985) 2

H.R.Rep. No. 179, 68th Cong., 1st Sess. 7 31

S.Rep. No. 398, 68th Cong., 1st Sess. 8 31

S.Rep.. 99-313, 1986-3 C.B. Vol. 3 208-9
(May 29, 1985) 2

Other Authorities:

5 Oxford English Dictionary 501
(2d ed. 1999) 14

Chief Counsel Notice (6/5/2000)
Change in Litigating Position 43

M. Carr Ferguson,
Jurisdictional Problems in Tax Controversies,
48 Iowa L.Rev. 312, n. 175 (1962-1963) 15

Webster's Third New
International Dictionary 792 (1961) 14

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Federal Circuit below is reported at 446 F.3d 1307 (Fed.Cir. 2006). Pet. App. 1-17. The opinion of the Court of Federal Claims is reported at 64 Fed.Cl. 71 (2005). Pet. App. Supp. 76-106. The opinion of the Fifth Circuit in *Beall v. United States* is reported at 336 F.3d 419 (5th Cir. 2003). Pet. App. 18-38.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. A timely petition for a writ of *certiorari* was filed July 28, 2006, and granted on January 12, 2007. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The following relevant statutory provisions, including relevant provisions of the Internal Revenue Code, are reprinted in the Appendix to the Petition for Writ of Certiorari at Pet. App. 39-55: 26 U.S.C. §§6015(f), 6110(j)(1)(B), 6330(d), 6404, 6511, 6512, 7422, 7430, and 7442, 28 U.S.C. §§1346(a)(1), 1491, and 2412. Relevant portions of the legislative history are reprinted in the Appendix to the Petition for Writ of Certiorari at Pet. App. 56-75 and in the Appendix to this brief.

STATEMENT OF THE CASE

This case is about whether the Court of Federal Claims ("the Claims Court") has jurisdiction in a refund case to review a refusal of the Internal Revenue Service ("IRS") to abate and refund interest that accrued against a taxpayer due to the IRS's own ministerial errors or delays.

Prior to 1986, the IRS asserted it had no statutory authority to abate interest that accrued due to its own errors and delays. In response, Congress enacted 26 U.S.C.

§6404(e).[1] Pet. App. 57-61.

For the tax years at issue, §6404(e)(1)(A) authorizes the IRS to abate all or any part of the interest assessed on any deficiency if the assessed interest is attributable, in whole or part, to errors or delays in performing ministerial acts by IRS officers or employees acting in their official capacity. Pet.App.42. A ministerial act is a procedural or mechanical act not involving the exercise of judgment or discretion that occurs during the processing of a taxpayer's case after all the prerequisites to the act have taken place. S.Rep.. 99-313, 1986-3 C.B. Vol. 3 208-9 (May 29, 1985); H.R.Rep. 99-426, 1986-3 C.B. Vol. 2 844-5 (Dec. 7, 1985); Treas. Reg. §301.6404-2T(b)(1); *Leffert v. Commissioner*, 81 T.C.M. (CCH) 1093, 1097-98 (2001); final §6404 regulations were issued Dec. 18, 1998, see Treas. Reg. §301.6404-2(b)(2).

The earliest district court and Claims Court cases addressing §6404(e)(1)(A) abatement refund claims found that those claims fell within existing §1346(a)(1) and §1491(a)(1) refund jurisdiction, but the claims were not justiciable because §6404(e)(1) was too general and lacked a standard for judicial review. Those early decisions concluded that §6404(e)(1) abatement was totally discretionary with the IRS. *Selman v. United States*, 941 F.2d 1060, 1062 (10th Cir. 1991); *Horton Homes, Inc. v. United States*, 936 F.2d 548, 550 (11th Cir. 1991);[2] *Kapp v. United States* , 989 F.2d 1202 (Table), 1993 WL 26728

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[1] Unless otherwise indicated all references to section, §, and the Tax Code are to the Internal Revenue Code at 26 U.S.C. References to §1346(a)(1) and §1491(a)(1) are to 28 U.S.C.

[2] Judge Allegra, who issued the *Hinck* decision in the Claims Court below, was one of the Government's appellate attorneys of record in *Horton Homes*. Neither party moved for recusal, and the Hincks agreed to go forward before Judge Allegra.

(Fed.Cir. 1993).[3] Subsequent courts have erroneously cited *Selman* and *Horton Homes*, without independent analysis, for the proposition that district courts lack subject matter jurisdiction over §6404(e)(1) cases. *Argabright v. United States*, 35 F.3d 472 (9th Cir. 1994); *Bax v. Commissioner*, 13 F.3d 54 (2nd Cir. 1993).

In contrast, the Tax Court consistently held that it lacked jurisdiction over §6404(e)(1) claims. *508 Clinton St. Corp. v. Commissioner*, 89 T.C. 352 (1987). In *508 Clinton St.*, the Tax Court recognized its limited jurisdiction is fixed by discrete statutory grants and that there was no such grant for §6404(e)(1) claims. The Tax Court also determined that §6404(e)(1) claims did not fit within any of the limited exceptions to the general rule that the Tax Court lacks jurisdiction over issues involving interest overpayments. The court also found, as a practical matter, it would be difficult to exercise its pre-assesment deficiency jurisdiction to consider potential interest on an unassessed deficiency, and moreover, §6404(e)(1), by its terms, is limited to requests for abatements only of interest that has been assessed. *508 Clinton St.*, at 354, *citing* §7442; *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420-422 (1943).

Subsequent appellate court consideration of Tax Court jurisdiction over §6404(e)(1) claims unanimously followed *508 Clinton St.* and further held the §7481(c) grant of continuing jurisdiction in 1988 allowing the Tax Court to make interest determinations relating to assessments paid following a Tax Court deficiency proceeding did not encompass §6404(e)(1) claims. Those later courts also held that the justiciablity determinations in *Selman* and *Horton Homes* also barred Tax Court consideration of §6404(e)(1)

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[3] Judge Lourie authored both the unpublished opinion in *Kapp* and the appellate opinion below in *Hinck*.

claims. *See Bax* at 57-8.

The facts relevant to this case are straightforward and undisputed. In 1986, John Hinck invested in Agri-Cal Venture Associates ("Agri-Cal"), a California limited partnership, and the Hincks reported their distributive share of losses on their joint 1986 income tax return.[4] Pet. App. Supp. 77. Agri-Cal was one of a group of limited partnerships collectively referred to as the "AMCOR partnerships" after their common general partner AMCOR, a California corporation. Morris Weiner was a limited partner in six AMCOR partnerships, including Agri-Cal. *Weiner v. United States* , 389 F.3d 152, 153-154 (5 th Cir. 2004) ("*Weiner*"). Raymond Beall was a limited partner in two other AMCOR partnerships. Pet. App. 19; *Beall v. United States*, 335 F.Supp.2d 743, 745 (E.D. Tex. 2004); see also *Beall v. United States*, 170 F.Supp.2d 709 (E.D. Tex. 2001).

The IRS examined the AMCOR partnership returns for tax years 1984, 1985, and 1986, and proposed to adjust some of the "partnership items" of some of the partnerships, including Agri-Cal. Partners other than the partners referenced here filed separate partnership-level Tax Court suits challenging those adjustments. Pet. App. Supp. 78; *Weiner* at 153-154.

While the partnership-level cases were pending, many AMCOR partners, including the Hincks, the Bealls, and Weiner, settled their partnership items with the IRS on Forms 870-P(AD). The Bealls and Weiner settled in 1997. The Hincks settled in 1999. Pet. App. Supp. 78.

In 1996, before the partners settled, Congress determined that, despite the 1986 grant of authority, the

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[4] Pamela F. Hinck is involved here only because the Hincks filed a joint return for 1986. Pet. App. Supp. 77.

IRS still refused to abate interest that accrued due to its own errors or delays. In 1996, in the Taxpayer Bill of Rights II ("TBOR2"), Congress amended §6404(e)(1) to add "unreasonable" before "errors and delays" and "managerial acts," a new type of act that could be the basis for abatement. Those changes are effective for interest accruing with respect to deficiencies or assessments for tax years beginning after July 30, 1996, and do not apply to the claims at issue here. In TBOR2, Congress also added §6404(h),[5] granting the Tax Court jurisdiction to review IRS refusals to abate interest under §6404(e)(1). Pet. App. 42-43. This provision applies to all years, not just the tax years beginning after July 30, 1996.

Pursuant to the Hincks', the Bealls', and Weiner's settlements, the IRS disallowed a portion of the partners' partnership items, assessed additional tax and interest against each, applied amounts they previously remitted, as applicable, and either billed them for the remainder, which was promptly paid, or refunded the excess to them. [6] The Hincks, the Bealls, and Weiner then each filed claims for refund including a Form 843 Claim for Refund and Request for Abatement. They all requested abatement and refund under §6404(e)(1)(A) of excessive interest accrued from March 21, 1989, until April 1, 1993, due to IRS errors and delays in the consolidated IRS examination of the AMCOR

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[5] Section §6404(h), though not substantively amended, has had its designation changed twice since its passage in 1996. The current §6404(h) was initially designated §6404(g). It was redesignated §6404(i) by the IRS Restructuring and Reform Act of 1998. Thus, from 1998 until 2002, it appeared in the United States Code as 26 U.S.C. §6404(i). In 2002, Public Law Number 107-134, §112(d)(1) repealed the former subsection (h) and designated then subsection 6404(i) as subsection (h), the designation it currently holds.

[6] The Bealls were assessed tax and interest in tax year 1981 due to a carryback from 1984.

partnerships. Their §6404(e) claims all arose out of identical facts regarding ministerial errors or delays by the IRS, asserted the same legal grounds for relief, and relied on the same authorities. Pet. App. 4, 19; Pet. App. Supp. 78-79; *Weiner* at 153-54; *Weiner v. United States*, 255 F.Supp.2d 624, 629-30 (S.D.Tx 2002), *rev'd on other grounds, Weiner*, 389 F.3d 152. The Bealls and Weiner raised multiple grounds in addition to §6404(e)(1) as bases for their refunds. Pet. App. 19-20; *Weiner* at 154.

The IRS issued notices of disallowance for all the claims filed by the Hincks and Weiner and all the claims filed by the Bealls (except their §6404(e)(1) claim). App. 4, 19; *Weiner*, 255 F.Supp.2d at 630.

Weiner and the Bealls reside in the Fifth Circuit and filed suit on their §6404(e)(1) claims in federal district court: Weiner in the Southern District of Texas and the Bealls in the Eastern District of Texas. Both based jurisdiction on §§1346(a)(1) and 7422(a). Pet. App. 21, *Weiner*, 255 F.Supp.2d at 659-60. The Hincks reside in California and filed suit in the Claims Court under that court's §§1346(a)(1), 1491(a)(1), and §7422(a) jurisdiction. Pet. App. Supp. 87.

Other AMCOR partners have filed similar refund claims and subsequent suits, primarily in the federal district courts of the Fifth Circuit and the Claims Court. Most of those partners raise multiple grounds for refund not at issue here. *Beall* (Fifth Circuit) and *Hinck* (Federal Circuit) were chosen as lead cases on §6404(e)(1) because they, uniquely, do not involve those other grounds for refund.[7] The other cases are stayed as to §6404(e)(1) pending the outcome of *Beall* and *Hinck*.

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[7] For procedural reasons, the Bealls' suit contained only their §6404 abatement claim.

In *Beall* and *Hinck*, the Government filed Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction asserting that §6404(e)(1) claims are justiciable only in the Tax Court and, therefore, the Tax Court has exclusive jurisdiction over those claims. Pet. App. 4-5, 19.

The Bealls and the Hincks relied on early §6404(e)(1) authority that recognized the district court's and the Claims Court's §1346(a)(1) and §1491(a)(1) refund jurisdiction over those claims. Pet. App. 6, 26. They both asserted the 1996 amendments to §6404 clarified that §6404(e)(1) abatement claims are now justiciable, not totally within the IRS's discretion. Consequently, the district courts and Claims Court are no longer barred from exercising their refund jurisdiction over those claims. The Hincks and the Bealls also asserted nothing in the plain language of the 1996 amendments or legislative history indicated the grant of Tax Court jurisdiction over §6404(e)(1) *pre-payment* claims automatically gave the Tax Court "exclusive" jurisdiction over *all* §6404(e)(1) claims. Otherwise, established §1346(a)(1) and §1491(a)(1) *refund* jurisdiction would have been impliedly repealed.

In July of 2001, the district court granted the Government's motion to dismiss in *Beall*. Pet. App. 19. The Bealls appealed and in 2003 the Fifth Circuit issued *Beall v. United States*, 336 F.3d 419 (5th Cir. 2003) ("*Beall*"), reversing the district court. The Fifth Circuit exhaustively analyzed §§1346(a)(1) and 7422(a) relative to §6404(e)(1), Pet. App. 20-26, and found that §6404(e)(1) claims for refund fit squarely within §§1346(a)(1) and 7422(a), Pet. App. 26. The court further held that the 1996 amendments clarified that §6404(e)(1) abatement claims are justiciable and not totally within the IRS's discretion. Pet. App. 30.

The Fifth Circuit was not persuaded that the grant of Tax Court jurisdiction automatically and silently repealed or limited the existing §1346(a)(1) refund jurisdiction over

§6404(e)(1) claims. Pet. App. 35-36. That court was persuaded that §6404(h) was added due to the limited nature of Tax Court jurisdiction, which is required to be specifically set out in the Tax Code, and nothing more should be read into the grant because nothing in the statute or legislative history indicated Congress meant for it to be exclusive. Pet. App. 36-37.

While *Beall* was pending, Weiner was chosen as the lead case in the Fifth Circuit to address the grounds for refund other than §6404(e)(1). The Fifth Circuit addressed those other grounds in a consolidated appeal from two district court cases at *Weiner*, 389 F.3d 152.[8] As to Weiner's §6404(e)(1) claims, the Fifth Circuit followed *Beall*, holding district courts had jurisdiction over those partners' §6404(e)(1) claims, and remanding his §6404(e)(1) claims for consideration on the merits.[9] *Weiner* at 163.

In February of 2005, the Claims Court granted the Government's motion to dismiss for lack of jurisdiction in *Hinck* on the grounds that §1346(a) was not a source of jurisdiction and that §1491(a)(1) jurisdiction was absent because the claim was not for an "illegal exaction." Judgment was entered February 4, 2005, and the Hincks appealed to the Federal Circuit. Pet. App. 4-5; Pet. App. Supp. 105.

The Federal Circuit addressed the same substantive legal and factual arguments raised in *Beall*. Pet. App. 18-38. But the Federal Circuit affirmed the lower court's

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[8] The Fifth Circuit vacated the dismissal for lack of jurisdiction over plaintiff's §6404(e)(1) claims at *Weiner v. United States*, 213 F.Supp.2d 728 (S.D.Tex., 2002), on remand to the district court; *Kraemer v. United States*, 2002 WL 575791 (S.D.Tex., 2002) (unpublished).

[9] The Claims Court has not yet ruled in the lead cases for those other issues.

dismissal on other grounds, holding that the 1996 grant of Tax Court jurisdiction was exclusive, withdrew existing Claims Court jurisdiction, and, consequently, the Claims Court did not have jurisdiction over the Hincks' §6404(e)(1) refund claims. Pet. App. 11-12. Unlike the Fifth Circuit, the Federal Circuit based its decision only on the amendments and accompanying legislative history and did not consider the nature of the Tax Court's limited jurisdiction, §§1346(a)(1), 1491(a)(1), and 7422(a) refund jurisdiction, or the general framework for resolving tax controversies. Pet. App. 13-15.

On July 28, 2006, the Hincks petitioned for writ of *certiorari* based on the split between the Fifth and Federal Circuits, which this Court granted on January 12, 2007.[10]

The Hincks assert that, after 1996, the Claims Court continues to have concurrent jurisdiction with the district courts under §§1346(a)(1) and jurisdiction under §1491(a)(1) to review §6404(e)(1) refund claims, notwithstanding the 1996 jurisdictional grant to the Tax Court.

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[10] After that petition was filed, on October 11, 2006, the Fifth Circuit issued an opinion at *Beall v. United States*, 467 F.3d 864 (5th Cir. 2006) ("*Beall II*"). On remand, the Government reasserted that the errors and delays at the heart of the Bealls' claim were not "ministerial acts" subject to §6404(e)(1) abatement. In *Beall*, 335 F.Supp.2d 743, the district court found for the Government, albeit on grounds not advanced by the Government, and dismissed under FRCP Rule 12(b)(6) for failure to state a claim. In *Beall II* the Fifth Circuit affirmed the dismissal but did not address or characterize all of the errors or delays raised by plaintiffs, particularly the most serious allegations. The Bealls moved for a clarification and/or reconsideration of the decision. That motion was denied. Consequently, the characterization of the IRS's most egregious errors and delays remains at issue in the pending §6404(e) cases. The Fifth Circuit's opinion in *Beall II* does not alter its holding in *Beall* that district courts have jurisdiction over §6404(e) interest abatement refund claims. The Claims Court has not yet addressed whether the errors and delays alleged, including loss of records and exceeding the scope of a search warrant, constitute ministerial acts.

Beall, Hinck and Weiner were all limited partners in AMCOR partnerships. Weiner and Hinck were both limited partners in Agri-Cal. The Fifth Circuit grants the AMCOR partners the right to a district court determination on the merits of their §6404(e)(1) claims for refund. The Federal Circuit denies that same right to Hinck and other AMCOR partners in the Claims Court.

SUMMARY OF THE ARGUMENT

Federal district courts and the United States Court of Federal Claims both have jurisdiction over §6404(e)(1)(A) refund claims under §1346(a)(1) and §7422(a). The Court of Federal Claims also has refund §1491(a)(1) jurisdiction over those claims. Prior to 1996, that jurisdiction was acknowledged, but it was widely held that §6404(e)(1) interest abatement determinations were totally discretionary with the IRS because the statute was too general and there was no standard for reviewing the IRS's actions. The Tax Court consistently held that it lacked jurisdiction over those claims for interest abatement because Congress had not made an express grant of jurisdiction to that court in the Tax Code as required by statute.

In 1996, Congress amended §6404 to include a specific grant of Tax Court jurisdiction and direct that court to review IRS interest abatement denials for abuse of discretion. Congress did not materially amend the other terms of the statute.

Those 1996 amendments answered the earlier questions regarding IRS discretion and judicial review of §6404(e)(1) abatement claims. The grant of jurisdiction to the Tax Court removed the impediments to the exercise of district court and Court of Federal Claims jurisdiction by clearly establishing Congress did not intend to leave abatement determinations to the IRS's discretion and that there is a justiciable standard for reviewing those claims.

The Fifth and Federal Circuits are split as to the effect of those amendments on jurisdiction. The Fifth Circuit holds that the district courts can now review IRS denials of §6404(e)(1) refund claims. The Federal Circuit holds that the Tax Court has exclusive jurisdiction and the amendments withdrew or repealed Court of Federal Claims jurisdiction over §6404(e)(1) abatement refund claims.

The plain language of the statute does not grant the Tax Court exclusive jurisdiction over §6404(e)(1) interest abatement claims. The plain language also does not withdraw or repeal established district court or Court of Federal Claims jurisdiction over §6404(e)(1) refund claims.

The Federal Circuit's holding is contrary to the established, historic bifurcation of Tax Court pre-payment jurisdiction and federal district court and Court of Federal Claims refund jurisdiction and opens the door for other challenges to this established jurisdictional scheme.

The Federal Circuit's holding that the Tax Court has exclusive jurisdiction also violates the due process rights of those taxpayers that are expressly excepted from Tax Court pre-payment jurisdiction and would require taxpayers to split their claims, which is contrary to established public policy and also results in due process violations.

ARGUMENT

I. The District Courts and Claims Court Have Concurrent §1346(a) Jurisdiction Over §6404(e)(1) Refund Claims

The Hincks filed suit under §1346(a)(1), which provides:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) any civil action against the United States for the recovery of any internal-revenue tax alleged to

> have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . .
>
> Pet. App. 51.

Section 1346(a)(1) is "broad" and "spacious" and allows taxpayers liberal redress to sue the United States to recover taxes which they feel have been wrongfully collected. *Williams*, at 532; *United States v. Dalm*, 494 U.S. 596, 601 (1990); *Flora v. United States*, 357 U.S. 63, 74 (1958) (*Flora* I).

It is well established that §1346(a)(1) confers subject matter jurisdiction and is a waiver of sovereign immunity, conditioned by the requirements of §7422(a). *See United States v. Williams*, 514 U.S. 527, 530 (1995). *C.f.*, *Beall*, Pet. App.21-22 (§1346(a)(1) is not a waiver of sovereign immunity but must be coupled with a claim brought under §7422(a) which waives immunity).

The Hincks cite to and complied with §7422(a), including making full payment and filing a refund claim with the IRS before filing suit.

The language in §7422(a) mirrors §1346(a)(1) and also provides for the recovery of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected."

Prior to the 1996 amendments, the consensus was that the plain language of §1346(a)(1), coupled with §7422(a), waives sovereign immunity and establishes district court and Claims Court subject matter jurisdiction over §6404(e)(1) refund claims. *See Selman* at 1062; and *Horton*

Homes at 550; *Kapp* at *1.[11]

The Fifth Circuit found the underlying grounds supporting jurisdiction first discussed in the early cases are just as applicable after the 1996 amendments to §6404.

A. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest

Any reference to tax in the Tax Code is deemed to encompass the interest on the tax. *See* §6601(e)(1) (providing that any reference "to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax"). *Beall*, Pet.App. 21, n.3; *Horton Homes* at 550.

More specifically, the phrase "any sum" refers to amounts that are neither taxes nor penalties. "One obvious example of such a 'sum' is interest." *Flora v. United States,* 362 U.S. 145 (1960) ("*Flora* II").

The three types of claims for refund encompassed by the statute are read disjunctively: for tax, penalties, and "any sum." *Flora* II at 149. Therefore, taxpayers may file suit under §1346(a)(1) solely for refund of interest.

B. Sections 1346(a)(1) and 7422(a) Encompass Refund Claims for Interest Accrued as a Result of IRS Errors or Delays

Sections 1346(a)(1) and 7422(a) provide for recovery of interest that is "excessive or in any manner wrongfully collected." Unabated interest attributable to IRS errors or delays that the IRS has refused to abate is excessive and wrongfully charged.

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[11] Later authority erroneously referred to the ultimate justiciablity determinations in those cases as holding that district courts and the Claims Court lacked jurisdiction. See discussion in *Beall* at Pet. App. 26.

Excessive is defined as "exceeding the usual, proper, or normal." Webster's Third New International Dictionary 792 (1961); 5 Oxford English Dictionary 501 (2d ed. 1999) ("Exceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant."). *See also, United States v. Bajakajian*, 524 U.S. 321 (1998) (in construing the term "excessive" in the context of the Excessive Fines Clause, "Excessive means surpassing the usual, the proper, or a normal measure of proportion.").

By providing for abatement of interest accrued and assessed as a result of IRS errors or delays, Congress indicated that such interest *per se* exceeds the usual, proper, and normal interest that accrues on taxes owed and is wrongful. (Otherwise, the IRS is allowed, if not encouraged, to profit from its mistakes and delays.)

In *Beall*, the Fifth Circuit was further convinced that where the Secretary's refusal to abate interest under §6404(e)(1) amounts to an abuse of discretion, such a refusal is improper, and the improperly unabated interest is, therefore, "excessive or . . . wrongfully collected."

C. Sections 1346(a)(1) and 7422(a) Encompass §6404(e)(1) Abatement Refund Claims

Sections 1346(a)(1) and 7422(a) encompass §6404(e)(1) claims for abatement. Those provisions are statutory and not constrained by their common-law ancestor, assumpsit, which did not provide for abatement actions. *See Beall*, Pet. App. 23, *citing Williams* at 532; and *Flora* II, 362 U.S. at 635-7. As this Court explained in *Williams* and *Flora* II, an action for refund under §1346(a) is no longer regarded as a common-law assumpsit action for recovery based on fraud, duress or mistake, "but rather as a statutory remedy which 'in its nature [was] a remedy against the Government.'" As such, the broad language of this statutory remedy provides for "recovery" of "any sum," which encompasses claims for abatement and refund of interest.

D. The Trial Court Erroneously Disregarded the Claims Court's §1346(a)(1) Jurisdiction

Almost all of the precedential authority addressing district court and Claims Court jurisdiction over §6404(e)(1) claims construes §1346(a)(1). However, the Claims Court below held that the phrase "concurrent with the United States Claims Court" at §1346(a)(1) is not an independent grant of jurisdiction, but a cross-reference to Tucker Act jurisdiction at §1491. The court asserted §1491(a)(1) is the sole source of the Claims Court's tax refund jurisdiction.

The court's sole authority for that assertion is a footnote in a law review article written in 1963. M. Carr Ferguson, *Jurisdictional Problems in Tax Controversies,* 48 Iowa L.Rev. 312, n. 175 (1962-1963), *citing Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002 (1967). While Mr. Ferguson's expertise is widely recognized, *Williams* at 532, in practice the jurisdictional approach suggested in the article has seen little development aside from the few authorities cited by the court below, which include that court's own recent opinions. Pet. App. Supp. at 84-5.

The court's approach to §1346(a)(1) is contrary to the general rules of statutory construction. The duty of the courts is to give effect to the intent of Congress, and the first reference is to the literal language of the statute. *Burlington No. R.R. v. Okla. Tax Comm.,* 481 U.S. 454, 461 (1987). The plain language of §1346(a)(1) is unambiguous: "The district courts shall have original jurisdiction, *concurrent with the United States Court of Federal Claims . . .*." If that phrase is not an independent grant of jurisdiction, the reference is superfluous and contrary to another basic rule of statutory construction - all parts of the statute are to be given meaning. *United States v. Menasche,* 348 U.S. 528, 538-539 (1955).

The Claims Court below erred in holding that §1346(a)(1) is not a source of jurisdiction for that court. The only rational reading is that it is a grant of jurisdiction or an interpretation of existing §1491(a) jurisdiction to include all of the types of claims recited in §1346(a)(1).

Moreover, it is the well established practice of the Claims Court and the Federal Circuit to refer to and rely upon §1346(a)(1) as a source of tax refund jurisdiction. The original unpublished Federal Circuit opinion on the §6404(e)(1) issue is based on a construction of §1346(a)(1) jurisdiction. *Kapp* at *1. Even Judge Allegra has considered claims for refund under §1346(a)(1). *See e.g.*, *Wertz v. United States*, 51 Fed. Cl. 443, 446 (Fed.Cl. 2002). *See also Roberts v. United States*, 242 F.3d 165, 167 (Fed.Cir. 2001) ("Section 1346(a)(1) provides concurrent jurisdiction for tax recovery suits in both U.S. district courts and the Court of Federal Claims."). *See also e.g.*, *Ammex, Inc. v. United States*, 384 F.3d 1368, 1370 (Fed.Cir. 2004); *Ledford v. United States* , 297 F.3d 1378, 1382 (Fed.Cir. 2002); *Foreman v. United States*, 60 F.3d 1559, 1562 (Fed.Cir. 1995) (citing §1346(a)(1), §1491(a) and §7422(a) as authority for Claims Court jurisdiction over refund actions); *Lovett v. United States*, 81 F.3d 143, 145 (Fed.Cir. 1996) (the Claims Court has jurisdiction to consider tax refund suits under §1346(a)(1)).*E.g.*, *Fuselier v. United States*, 63 F.3d 8, 11 (Fed.Cl. 2004) (the Claims Court has jurisdiction over tax refund cases, citing §1346(a)(1) and §1491).

II. The Claims Court also has §1491(a)(1) Jurisdiction Over §6404(e)(1) Claims

In the alternative, the Hincks' complaint is also based on §1491(a)(1), the Tucker Act, which confers power on the Claims Court to render judgment on:

> any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon

> any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Tucker Act is both jurisdictional and a waiver sovereign immunity *eo nomine* for the classes of claims described therein. But §1491(a)(1) does not confer substantive rights for recovery. An action under that provision must be based on the Constitution, federal statute, or a regulation. *United States v. Mitchell*, 463 U.S. 206, 215-6 (1983).

If the Constitutional provision, statute, or regulation upon which the claim is based is encompassed by the Tucker Act, no separate waiver of sovereign immunity is required beyond the Tucker Act's consent to suit. Nor does the statute upon which the claim is based need to be construed in a manner appropriate to waivers of sovereign immunity. *Mitchell* at 218-9, *citing Emery, Bird*, 237 U.S. at 32. As Cardozo made clear, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926), *cited* by *Mitchell* at 218-9.

A. Suits for Refund Under the Revenue Laws are Encompassed Under §1491(a)(1)

Since 1887, it has been well-established that suits to obtain refund of income taxes are founded upon the laws of Congress and/or regulations of an executive department, the IRS, and sovereign immunity has been waived. *Flora* I, 357 U.S at 70, *citing United States v. Emery, Bird, Thayer*

Realty Co., 237 U.S. 28 (1915).[12] And pursuant to *Mitchell*, there does not need to be a separate waiver of immunity set out in the revenue laws to bring a refund action.

The Hincks' claim is one for refund of interest under the revenue laws, specifically §6404(e)(1). Consequently, their claim fits squarely within §1491(a)(1), immunity is waived, and a second statutory waiver of immunity is not necessary.

B. Section 6404(e)(1) is Money Mandating

In the alternative to this established §1491(a)(1) refund jurisdiction, the Claims Court also has jurisdiction over the Hincks' claim because §6404(e)(1) is "money mandating." A statute is "money mandating" if it mandates compensation for damages sustained. *United States v. Testan*, 424 U.S. 392, 400 (1976).

Stated another way, a statute is money mandating if payment is mandated when the statutory conditions are met. The factors considered in making this determination include: (i) the language of the statute, particularly whether the permissive "may" is used as opposed to "shall;" (ii) indications of legislative intent to the contrary; and (iii) obvious inferences from the structure and purpose of the statute. *See McBryde v. United States*, 299 F.3d 1357, 1361-2 (Fed. Cir. 2002), *citing Doe v. United States* , 100 F.3d 1576, 1582 (Fed. Cir. 1996), and discussing changes to inferences drawn from discretionary language such as

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[12] Justice Holmes observed in construing whether a district court, sitting as a Claims Court, had jurisdiction over an action for refund of taxes under the Little Tucker Act, then codified at §24(20). Justice Holmes saw no difference in the grant of jurisdiction between the two courts and no reason why the accepted authority that claims for refund of tax are founded upon the acts of Congress and/or regulations of the executive department under the Tucker Act should not be expanded to the district courts under the Little Tucker Act, then codified at §24(20).

"may" after *United States v. Rodgers* , 461 U.S. 677, 706 (1983).

These factors parallel the factors for determining whether a statute is so discretionary that judicial review is precluded and are discussed in greater detail below. To summarize here, §6404(e)(1) provides that the IRS may abate any assessment of interest attributable to errors or delays by IRS employees or officers in performing ministerial acts. As this Court recognized in *Rodgers*, the use of the word "may" is not conclusive of discretion. In this case, legislative intent indicates Congress meant for the IRS to abate this excessive interest caused by its own errors or delays. And by expressly giving the Tax Court jurisdiction without amending the "may" language, Congress clarified that §6404(e)(1) claims are not permissive or discretionary and do create a judicially enforceable right of recovery if the statutory terms are met.

Neither the Claims Court nor the Federal Circuit addressed the Hincks' primary argument for §1491(a)(1) refund jurisdiction nor the money mandating alternative.

C. The Hincks' Claim is Not Based on the Problematic Illegal Exaction Doctrine/Rational

Instead, the Claims Court *sua sponte* dismissed the Hincks' §6404(e)(1) claims for lack of jurisdiction because there was no basis to conclude the retention of plaintiffs' funds was an "illegal exaction." Pet.App.Supp.105. Alternatively, the court concluded that abatement actions remain discretionary and not justiciable. Pet.App.Supp.105 at n.23. The court erred in its determinations.

Illegal exaction is a problematic vehicle for recovering

taxes.[13] This rational for §1491(a)(1) tax refund jurisdiction has been little used since codification of refund jurisdiction in the early twentieth century.

An "illegal exaction" involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."*Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed.Cir.,1996), *citing Eastport* at 605. The Tucker Act provides jurisdiction to recover an illegal exaction by Government officials when the exaction is based on an asserted statutory power. *Eastport* at 605.

As can be seen from the following examples, the Hincks' refund claim is not the type usually brought as an illegal exaction, and they have not made such an assertion. Examples of illegal exactions, cited in *Aerolineas* at 1573, include: (i) money collected by enforcement of regulation that was contrary to statute, *Eversharp, Inc. v. United States,* 129 Ct.Cl. 772, 776, 125 F.Supp. 244, 247 (1954); (ii) money collected pursuant to a repealed statute, *Carriso v. United States,* 106 F.2d 707, 712 (9th Cir.1939); and (iii) recovery of money illegally collected from the plaintiff as fines under void convictions and sentences, *Mallow v. United States,* 161 Ct.Cl. 446, 450 1963 WL 8503 (1963).

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[13] The plaintiffs in *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed.Cir. 1997) were attempting to recover a cash bond in anticipation of an unassessed liability. Unlike refund claims, the procedure to recover a cash bond in the absence of an assessment is less well defined, and the court looked with favor on the "illegal exaction" theory on the facts of that case. The dissent asserted the plaintiffs and the majority in that case "reache[d] for the 'illegal exaction' *dicta* from *Eastport Steamship Corp.*," and the court should not have to "struggle" with the "illegal exaction notion" because "the United States Code has already provided a clear remedy to recover taxes paid without legal basis. Indeed 28 U.S.C. §1346 expressly waives sovereign immunity and provides jurisdiction [in the Claims Court] for recovery of funds paid as taxes." *New York Life* at 1561.

Illegal exaction also involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. *Norman v. United States,* 429 F.3d 1081 (Fed.Cir.2005). This "illegal exaction" prong of *Eastport* has seen little development outside of civil forfeiture cases*i.e.*, "takings." *See e.g., Crocker v.* United States, 37 Fed.Cl. 191, 197-8 (1997). While the Hincks do assert that the net worth requirement in §6404(h) violates due process, they do not assert that the failure to remit excess interest is a "taking."

The particulars of discretion and the court's justiciability determination are discussed below.

III. The Fifth and Federal Circuit Split Destroys the Integrated Jurisdictional Plan Between the District Courts and the Claims Court

Although the Federal Circuit discussed prior §6404(e)(1) jurisdictional analysis, including *Beall*, that court did not make a direct determination with respect to §1346(a)(1) or §1491(a)(1). That court based its dismissal for lack of jurisdiction on a determination that the Tax Court has exclusive jurisdiction over §6404(e)(1) claims – a decision that erroneously repeals by implication §1346(a)(1) jurisdiction and §1491(a)(1) refund jurisdiction and directly conflicts with the Fifth Circuit's decision in *Beall*.

To paraphrase this Court, providing for expeditious and orderly determination of claims against the Government demands an integrated jurisdictional plan between the district courts and the Claims Court. Uniformity and equality in substantial rights and privileges for claimants in both forums are essential to the system. Distinctions between the opportunities for recovery afforded in the two forums mar the symmetry of the plan and impair its effective and successful operation. *Bates Mfg. Co. v. United States*, 303 U.S. 567, 570-71 (1938). The split between the Fifth and Federal Circuits over §6404(e)(1) jurisdiction

destroys this integrated plan.

IV. The Nature of Tax Court's Jurisdiction

The jurisdictional grants at §§1346(a)(1) and 1491(a)(1) are truly "broad" and "spacious" compared to the parsimonious scheme of Tax Court jurisdiction.[14]

A. Tax Court Jurisdiction Must Be Specifically Set Out in the Tax Code

The Tax Court is an Article I court possessing only such power as Congress expressly confers on it in the Tax Code. §§7441 and §7442 at Pet. App. 50; *e.g. Est. of Wenner*, 116 T.C. 284, 286 (2001); *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Continental Equities, Inc. v. Commissioner*, 551 F.2d 74, 79 (5th Cir. 1977), *aff'g in part & rev'g in part* T.C. Memo 1974-189.

Consequently, the Tax Code is littered with discrete jurisdictional grants to the Tax Court that are narrowly construed and may not be expanded *sua sponte* or by the parties. *See Halpern v. Commissioner*, 96 T.C. 895 (1991), *citing Naftel v. Commissioner* , 85 T.C. 527, 529 (1985). Because the Tax Court has no jurisdiction over an issue unless there is a specific grant in the Tax Code, those grants are not, by themselves, *indicia* that the Tax Court has exclusive jurisdiction over that issue or that concurrent jurisdiction of other courts over that issue is abrogated.

B. The Tax Court's Only General Jurisdiction is Over Deficiencies

Section 6213(a) is the most "general" of the discrete

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[14] The Federal Circuit is unique among the federal appellate courts in that it alone cannot review appeals from the Tax Court. §7482(a)(1). As a result, it is rare that the Federal Circuit is required to delve deeply into the byzantine cul-de-sacs of Tax Court jurisdiction, particularly the exceptions to Tax Court jurisdiction at issue here.

jurisdictional grants to the Tax Court, and the one that most closely corresponds to §1346(a)(1) and §1491(a)(1). Section 6213(a) grants the Tax Court jurisdiction to review deficiency cases. A deficiency is the amount by which the tax imposed exceeds the amount shown by the taxpayer on his return, plus any previous adjustments, less any rebates. §6211. A deficiency can informally be thought of as the amount of additional tax the IRS says a taxpayer owes.

The Secretary is required to mail a notice of deficiency to the taxpayer before assessing the additional tax. A notice of deficiency is a prerequisite to the Tax Court's deficiency jurisdiction. §6212. Once a notice of deficiency is issued, the taxpayer can elect to file a pre-payment petition with the Tax Court for a redetermination of the deficiency. §6213.

C. Section 6213 Jurisdiction Does Not Include Interest or Refund Determinations

Section §6601(e) states that interest is to be paid, assessed, and collected in the same manner as tax, and that any reference to tax also includes interest. However, §6601(e) specifically excepts interest from the definition of a deficiency and the Tax Court's deficiency jurisdiction. §§6211 and 6213(a).

Consequently the Tax Court's general jurisdiction is limited to deficiencies, *i.e.*, unassessed tax. The well-established general rule is that the Tax Court lacks jurisdiction to determine interest and refunds (overpayments). *See Bax* at 56-57; *LTV Corp. v. Commissioner*, 64 T.C. 589, 597 (1975); *see also Asciutto v. Commissioner*, T.C. Memo.1992-564, *affd.* 26 F.3d 108 (9th Cir.1994); *White v. Commissioner*, 95 T.C. 209, 213-4 (1990).

This key point distinguishes the three courts at issue. The district courts and Claims Court have refund jurisdiction over claims for tax and interest that has been assessed and paid. The Tax Court generally does not. There

are limited exceptions to this general rule.

Under §6512(b), once the Tax Court acquires §6213 jurisdiction to redetermine a deficiency, it also acquires supplemental jurisdiction to determine income tax overpayments for that tax year. *See Estate of Baumgardener v. Commissioner*, 85 T.C. 445 (1985); *Barton v. Commissioner*, 97 T.C. 548, 554-555 (1991); *Winn-Dixie Stores, Inc. & Subs. v. Commissioner*, 110 T.C. 291 (1998). But, if the Tax Court lacks jurisdiction over the underlying grounds for the petition, the Tax Court also lacks §6512(b) overpayment jurisdiction *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006) (because deficiency had been satisfied by levy, the taxpayer's §6330(d) collection due process action was moot, the Tax Court lacked jurisdiction over the case and, therefore, could not determine overpayments)

Other exceptions are former §6621(c) and §7481(c). Former §6621(c)(4) allows the Tax Court to make §6621(c) tax motivated transaction interest determinations.[15] Section 7481(c) grants the Tax Court continuing limited jurisdiction to reopen a deficiency case to determine the interest on the deficiency in the original proceeding.

In none of these instances does the grant of Tax Court jurisdiction in the Tax Code withdraw, bar, or repeal the existing refund jurisdiction of the district courts or the

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[15] *See Lincir v. Commissioner*, 115 T.C. 293, 298-300 (2000). Former §6621(c) was repealed by §7721(b) of the Omnibus Budget Reconciliation Act of 1989, Pub.L. 101-239, 103 Stat. 2106, 2399, effective with respect to returns the due date for which is after December 31, 1989. Section 6621(c) interest is at issue in most of the AMCOR partner cases, including *Weiner*, but not here as to Hinck or as to Beall. The Government has never challenged district court or Claims Court jurisdiction to review §6621(c) interest refund claims on the grounds that §6621(c)(4) grants exclusive jurisdiction to the Tax Court.

Claims Court.

D. An Express Grant in the Tax Code Was Required to Establish Tax Court Jurisdiction Over §6404(e)(1) Claims

Prior to 1996, the Tax Court held it lacked any jurisdiction with respect to §6404(e)(1) abatement claims. *See 508 Clinton St., supra.* Subsequent courts also held that the exceptions to the general rule could not be expanded *sua sponte* to encompass §6404(e)(1) claims. *Bax* at 58; *Ho v. Commissioner*, T.C.Memo 1998-363. Pre-1996 authority unanimously held that the Tax Court could not review §6404(e)(1) cases without a specific statutory grant of jurisdiction, which Congress had not granted when it enacted §6404(e) in 1985. *Bax* at 58; *Melin v. Commissioner*, 54 F.3d 432, 434 (7th Cir. 1995).

In the 1996 TBOR2, Congress amended §6404 to add a specific grant of Tax Court jurisdiction over §6404 claims. Section 6404(h) gives the Tax Court jurisdiction over any action brought by taxpayers who meet certain net worth and other requirements to determine whether the IRS's failure to abate interest as provided in §6404 was an abuse of discretion. Pet. App. 42. This jurisdiction is not limited to §6404(e)(1) claims, but also encompasses the other interest abatement provisions at §6404 as well.

V. The Tax Court Does Not Have Exclusive Jurisdiction Over §6404(e)(1) Claims

The Federal Circuit erred in holding that Congress vested in the Tax Court "exclusive jurisdiction over interest abatement claims, and thus withdrew subject matter jurisdiction from all other courts over those claims." Pet. App. 15.

A. The Plain Language of §6404(h) Does Not Vest the Tax Court With Exclusive Jurisdiction

Section 6404(h) does not use the term "exclusive" or otherwise indicate that the Tax Court's jurisdiction is exclusive. Nor is there any language in the other amendments to §6404 indicating that the Tax Court's jurisdiction over interest abatement actions is exclusive.

When Congress intends to make a remedy exclusive to a particular court, it makes its intention clear. For example, in the event of unauthorized disclosures the "*exclusive* civil remedy [is] an action . . . in the . . . United States Court of Federal Claims . . . ." §6110(j) at Pet. App. 40, emphasis added. Section 7482(a)(1) expressly states that the "United States Courts of Appeals (other than the . . . Federal Circuit) shall have *exclusive* jurisdiction to review the decisions of the Tax Court, ..." Emphasis added.

The Federal Circuit's conclusion that the Tax Court has exclusive jurisdiction over interest abatement claims is based largely on the absence of language expressly granting jurisdiction to the district courts and Claims Court. Applying the same logic, the district court in *Beall* reasoned, "Congress would certainly have specifically provided for federal court jurisdiction in 6404(i) [now §6404(h)] if it intended the federal courts, not simply the Tax Court, to review interest abatement claims. . . . [T]he plain wording of 6404(i) vests jurisdiction to review interest abatement decisions solely in the Tax Court." 170 F.Supp.2d at 712. The Fifth Circuit did not agree and reversed.

But, as discussed above, this Court has clearly stated that if a claim is based on a statute encompassed by the Tucker Act there does not need to be a second draft of jurisdiction or waiver of sovereign immunity. *Mitchell* at 218-19. The same analysis should extend to §1346(a)(1).

This argument, that a grant of jurisdiction to the Tax Court is exclusive based on the absence of a reference to other courts, is only applicable if there is no other existing concurrent or overlapping jurisdiction in another court. For example, any person who has received notice that the IRS intends to disclose information may file a petition in the Tax Court for a preemptive determination. §6110(f)(3). Any person who requests disclosure of information may file a petition in the Tax Court or a complaint in the district court for the District of Columbia. §6110(f)(4). The grants of jurisdiction in those provisions can reasonably be read as exclusive because unauthorized disclosure actions do not fit within §1346(a)(1)'s general refund jurisdiction.

Also, if the Tax Court has "jurisdiction of the underlying tax liability" then appeal from the determinations of a §6320/6330 collection due process hearing must be made to the Tax Court. §6330(d); Treas. Reg. §301.6330-1T(F)(2); *Bartschi v. Tracy*, 2001-2 U.S.T.C. ¶50,672, 2001 WL 1338795, *3 (D. Ariz. 2001) and authorities cited therein. *See also Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). The Tax Court has exclusive jurisdiction over appeals from collection due process hearings not because Congress stated its jurisdiction was exclusive, but because there is no other existing concurrent or overlapping jurisdiction in another court.

Congress makes its intention clear when it limits or circumscribes existing jurisdiction. For example, §7422(h) limits the §7422(a) waiver of sovereign immunity over refund actions. Refunds attributable to partnership items can only be brought within the limits set out at §6228(b) or §6230(c). Nothing in the 1996 amendments limited or even addressed the existing, acknowledged district court and Claims Court jurisdiction.

In the absence of express language granting the Tax

Court "exclusive" jurisdiction over §6404(e) claims (as with unauthorized disclosure actions) or clarifying that the district courts and the Claims Court are barred from exercising their existing jurisdiction (as with §7422(h) and the sequential jurisdiction set out for levy determinations or the §7482(a)(1) express bar precluding the Federal Circuit from reviewing Tax Court cases), no inference can or should be made regarding existing district court and Claims Court jurisdiction simply because of the grant of jurisdiction to the Tax Court.

B. Implied Repeal of Existing Federal Court Jurisdiction is Disfavored

The Fifth Circuit correctly recognized that when viewed against a proper reading of the *Horton Homes* cases -- the district courts and the Claims Court have jurisdiction over §6404(e)(1) claims – holdings such as those by the Claims Court and Federal Circuit below essentially become a claim that Congress, in granting jurisdiction to the Tax Court to review interest abatement denials without mentioning the existing jurisdiction of the other courts, impliedly repealed that existing jurisdiction. Pet. App. 34.

But it is a "cardinal rule" of statutory construction that "repeals by implication are not favored." *Morton v. Mancari,* 417 U.S. 535, 549-550 (1974); *Wood v. United States,* 16 Pet. 342, 363, 10 L.Ed. 987 (1842); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996) ("It is hornbook law that 'repeals by implication are not favored.' ") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442 (1987)).

Congressional silence will not be deemed to effectuate a repeal by implication unless the legislative history contains an affirmative indication that Congress intended to repeal. *Morton* at 550. In the absence of some affirmative showing of intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v.*

Pennsylvania R. Co., 324 U.S. 439, 456-57 (1945). This would be the case if the later statute expressly contradicts the original act or if implicit repeal is absolutely necessary for the later statute to have any meaning at all. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The courts are not at liberty to pick and choose among congressional enactments. And when two statutes are capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intent to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible .... The intention of the legislature to repeal 'must be clear and manifest.'" *Morton* at 551, *quoting United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

When Congress enacted the §6404(h) grant of Tax Court jurisdiction, it remained silent as to existing district court and Claims Court refund jurisdiction except to say that no inferences should be drawn. Pet. App. 63. The grant of jurisdiction to the Tax Court and the existing refund jurisdiction of the district courts and the Claims Court are easily reconciled within the established framework for tax controversies. Congress expressed no "clear and manifest" affirmative indication that it intended to repeal the existing §§1346(a)(1), 1491(a)(1), and 7422(a) refund jurisdiction of the district courts and the Claims Court. Therefore, the Federal Circuit below erred when it picked and chose between reconcilable congressional enactments capable of co-existence and did not regard each as effective.

C. Exclusive Jurisdiction is Inconsistent with the Legislative Scheme for Tax Controversies

In *Flora* II, the Government urged this Court to adopt the same alleged "plain language" approach the Federal Circuit applied in *Hinck*, *i.e.*, that the absence from the grant of Tax Court jurisdiction of an express reaffirmation

of the existing jurisdiction of other courts is conclusive proof that that jurisdiction does not exist. This Court declined, noting that if the statutory language alone was so clear, then presumably the courts "could but recite the statute and enter judgment" and "might be pardoned some perplexity as to how such a simple matter could have caused so much confusion." *Flora* II at 148. But this Court recognized that "this facile an approach will not serve" with respect to a question of such considerable importance in the administration of the tax laws. *Flora* IIat 148.

As this Court noted in construing §1346(a)(1), "[w]e are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws." *Flora* II at 157.

The entire structure of tax controversy jurisdiction is built on a basic scheme. The Tax Court has almost exclusively been granted jurisdiction to hear deficiency disputes, with only very limited grants of jurisdiction regarding other types of issues, including interest and post-payment refund actions. In contrast the district courts and Claims Court have very broad post-payment refund jurisdiction, but very limited pre-payment jurisdiction, such as rarely granted injunctive relief.

This Court recognizes that one of the principal, if not *the* principle, reasons Congress created the predecessor of the Tax Court, was to provide the taxpayer with a means of avoiding the hardship inherent in being forced to first pay the asserted tax before seeking a judicial review of the assessment. *Flora* II at 158. This Court relied on the express legislative history in the House Committee Report explaining the Board's purpose:

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional

> assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof . . . [t]he right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous . . . sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayers to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

H.R.Rep. No. 179, 68th Cong., 1st Sess. 7. See also, S.Rep. No. 398, 68th Cong., 1st Sess. 8.

In *Flora I*, this Court recognized this bifurcated tax controversy scheme, *i.e.*, that the statutory nature of Tax Court jurisdiction and §1346 jurisdiction create "a system in which there is one tribunal for *pre-payment* litigation and another for *post-payment* litigation . . ." *Flora* I at 163 (emphasis added.). The logic of this statutory scheme has been endorsed by the appellate courts. See also the *Poretto* "pay and sue" directive. *Poretto v. Usry*, 295 F.2d 499, 501-02 (5th Cir. 1961) and *Rotenberry v. Commissioner*, 847 F.2d 229, 230 (5th Cir. 1988).

To hold that a grant of jurisdiction in the Tax Code automatically grants the Tax Court exclusive jurisdiction overlooks the statutory nature of Tax Court authority, ignores the basic bifurcation of pre- and post- payment actions, and is without authority.

This distinction between pre- and post- payment jurisdiction is carried over to the statutes of limitation. For example, the statutes of limitation for a pre-payment suit

in the Tax Court are consistently much shorter than those for a refund suit in other courts. Section 6213(a) grants the Tax Court jurisdiction to address pre-payment disputes over tax deficiencies if the Tax Court petition is filed within 90 days after the notice of deficiency is issued. In the 1996 grant of Tax Court jurisdiction, Congress mirrored this abbreviated pre-payment limitations period by restricting the period to file a §6404(e) interest abatement petition in the Tax Court to 180 days after the IRS formally denies the §6404(e)(1) refund claim.

In *Beall*, the Fifth Circuit examined the general jurisdictional scheme and held that reading the grant of jurisdiction to the Tax Court as automatically excluding district court refund jurisdiction was inconsistent with the general structure of the Tax Code and the limited jurisdiction of the Tax Court. Pet. App. 20-26.

D. The Legislative History Does Not Support Exclusive Tax Court Jurisdiction

The legislative history to the 1996 amendments does not indicate Congress intended for the Tax Court to have exclusive jurisdiction over §6404(e)(1) claims. *See* H.R. Rep. No. 104-506, at 28 (1996). Pet.App.62-63. While that House report discusses the Tax Court's jurisdictional grant, it does not expressly say or overtly infer that that grant is exclusive.

On the other hand, the statement of present law in the report indicates Congress was aware of the *Horton Homes* line of cases. Pet. App. 63 ("Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.") Congress is presumed to know the law and to have realized the prior authority had actually held the district courts and Claims Court (but not the Tax Court) had jurisdiction, but were precluded from exercising it and why. Like later §6404(e)(1) authorities, Congress instead misapplied the term "jurisdiction." As the Fifth Circuit

noted, jurisdiction is a word of too many meanings. *See, e.g., Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)).

Moreover, after affirmatively demonstrating it was aware of the then-current state of the law, Congress clarified and resolved each of the issues on which the federal courts determined justiciability. Congress clarified that IRS abatement decisions were not totally discretionary by granting the Tax Court jurisdiction to review those decisions. Congress also clarified that those IRS determinations should be reviewed for abuse of discretion.

After answering all of the previous objections, Congress did not take the obvious next step to preclude the exercise of jurisdiction by the other federal courts. Congress did not state that the district courts and Claims Court *did not* have jurisdiction to review interest abatement denials. Instead, the House report clearly states that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." Pet.App. 63.

The Federal Circuit made just such an inference and then erroneously buttressed its conclusions with ambiguous language in legislative history to the proposed, but never passed, Taxpayer Bill of Rights 2000. H.R.Rep. No. 106-566, at 32 (2000). Pet. App. 14-15, 64. The legislation to which that report relates, H.R. 4163, was never enacted.[16] As this Court has said, "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 501 (1988). *See also Ratzlaf v. United States,* 510 U.S. 135, n.18 (1994) ("We do not find

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[16] H.R. 4163 passed the House on April 11, 2000, and was referred to the Senate on April 12, 2000. The legislation never left the Senate Finance Committee.

that Report, commenting on a bill that did not pass, a secure indicator of congressional intent at any time, and it surely affords no reliable guide to Congress' intent in 1986. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (cautioning against giving weight to 'history' written years after the passage of a statute)"). To borrow from Justice Scalia, "[t]oday's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. . . . This is beyond all reason, and we should say so." *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (SCALIA, J., concurring in part and concurring in judgment).

E. Assumed Expertise is No Basis on Which to Infer Exclusive Jurisdiction

The Federal Circuit buttressed its exclusivity determination by observing that the Tax Court is a specialized court with expertise in tax matters, and concluded it is suited to address this issue. Pet. App. 12-13. Tax Court judges may have more specialized knowledge of complex substantive tax statutes, but they have no specialized expertise in recognizing an abuse of discretion in denying an interest abatement request.

While the Hincks are confident that Tax Court judges are imminently qualified and knowledgeable in the area of substantive tax law, the issues raised with respect to §6404(e)(1) abatement determinations do not turn on the intricacies of tax law, but whether IRS officers or employees erred or delayed in performing ministerial acts. Treas. Reg. §301.6404-2T(b)(1); *Leffert* at 1097-98. Final regulations under §6404 were issued Dec. 18, 1998, see Treas. Reg. §301.6404-2(b)(2). The Tax Court is no better qualified to review and evaluate the IRS's mechanical or procedural acts than the district courts or the Claims Court. Moreover, it has never been contended that Tax Court pre-payment jurisdiction to review tax deficiencies allegedly arising from

complex substantive tax issues automatically repeals refund jurisdiction of the district courts and the Claims Court over those same complex disputes. Finally, Tax Court pre-payment cases are appealable to the same Circuit Courts as the district courts who would hear the case in a refund action. *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971). The unavoidable conclusion is that §6404(e)(1) should be reviewed by the district courts and the Claims Court in refund cases using the same standard the Tax Court uses in pre-payment cases and that district courts and the Claims Court currently use to review other "discretionary" acts by the IRS.

VI. The Claims Court Erroneously Followed Pre-TBOR2 Cases to Hold That §6404(e)(1) is Totally Discretionary Because The Provision Was Not Judicially Manageable

The *Horton Homes* line of cases ultimately held the IRS's refusal to refund interest under §6404(e)(1) is (i) purely discretionary because Congress used "may" instead of "shall" in describing the IRS's authority, and (ii) not reviewable because §6404(e)(1) has no standards to apply in reviewing the IRS's decision and no directives or guidelines the IRS must follow when reviewing requests for abatement other than that the IRS should permit abatement "where failure to abate interest would be widely perceived as grossly unfair." *Brahms v. United States*, 18 Cl.Ct. 471, 475-77 (1989). When stripped to its essentials, the Claims Court below erroneously rested its holding on the same determination.

A. Pre-TBOR2 Cases Erroneously Relied on the APA

The taxpayers in *Brahms*, *Selman*, and *Horton Homes* sought a refund of interest under §6404(e)(1) and attempted to recover pursuant to §1346(a)(1), and/or §1491(a)(1), and

§7422(a). Also relying on the Administrative Procedures Act ("APA"), codified at 5 U.S.C. §§701-706, the taxpayers in *Brahms*, one of the earliest §6404 cases, filed suit without first paying the assessment and filing a refund claim. The Claims Court dismissed based on its APA analysis. In *Selman* and *Horton Homes*, the taxpayers did pay and file refund claims, but their actions were also ultimately dismissed based on an APA analysis. *Brahms* at 550-552; *Selman* at 1064; and *Horton Homes* at 554.

Sections 1346(a)(1), 1491(a)(1), and 7422(a) were in place when Congress enacted §6404(e)(1) in 1978. These provisions provide an independent source of jurisdiction and waiver of sovereign immunity over tax refund actions. The Hincks do not base their claim on the APA. Both the Fifth Circuit and the Claims Court below have held that §6404(e)(1) claims for refund are not subject to the APA.

B. Early §6404(e)(1) Cases Concluded Judicial Review Was Precluded

In declining to make §6404(e)(1) determinations, *Brahms*, *Selman*, *Horton Homes*, and the other pre-TBOR2 cases all relied on Supreme Court analysis of APA §701. *Brahms* at 475; *Selman* at 1063, *citing Webster v. Doe*, 486 U.S. 592, 599 (1987). The Supreme Court has explained that judicial review is precluded under §701 if Congress expressly prohibited judicial review, or "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" §701(a)(1); §701(a)(2); *Argabright* at 476, *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (the §702(a)(2) exception is triggered only "in those rare instances where 'statutes are drawn in such broad terms that there is no law to apply.'"). *See also Selman* at n.10. The APA codified well-established common law rules of judicial preclusion, and the analysis is equally applicable to non-APA cases.

The pre-TBOR2 cases recognized the presumption in favor of judicial review of agency actions and that this presumption can only be overcome by clear and convincing evidence of contrary legislative intent. *Brahms* at 475; *Argabright* at 476; *Selman* at 1064; *Horton Homes* at 551.

The prior lines of §6404 authority all recognized that judicial review was not expressly prohibited by the statute. Instead, *Selman*, *Horton Homes, and Brahms* all held judicial review of §6404(e)(1) claims was barred because §6404(e)(1) was drawn so broadly that there was no meaningful standard against which to judge the agency's exercise of discretion. This analysis simply does not apply after TBOR2, where Congress expressly acknowledged a right to judicial review without substantially changing the language of the statute.

C. TBOR2 Invalidates All Prior Grounds for Supporting Total IRS Discretion

Spurred by widespread reports of IRS misconduct, in 1996 Congress enacted TBOR2 to provide for increased taxpayer protection. The amendments to §6404 in TBOR2 prove that Congress did not intend interest abatements to be entirely discretionary with the IRS, whether or not that finding was reasonable when *Brahms*, *Selman*, *Horton Homes*, *etc.* were first decided. The amendments overcome each argument the pre-TBOR2 cases relied upon. Consequently, the district courts and the Claims Court are not barred from exercising their jurisdiction.

1. TBOR2 Adopts the Common Law Standard of Review

Both *Selman* and *Horton Homes* concluded that there was no "meaningful" or "judicially manageable standard" to review IRS determinations. *Brahms* is based on a similar determination.

But in TBOR2 Congress made it clear that there is a meaningful standard for judicial review by directing the

Tax Court to review §6404(e)(1) determinations for "abuse of discretion." The Tax Court holds the IRS abuses its discretion if its denial is arbitrary, capricious, or without sound basis in fact or law. See *Lee v. Commissioner*, 113 T.C. 145, 149 (1999). The district courts and Claims Court already apply this same standard in APA cases and are directed to hold unlawful and set aside agency actions, findings, and conclusions that are "arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with the law." 5 U.S.C. §706, emphasis added; *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed. Cir. 2000). Therefore, this standard is clearly manageable by district courts and the Claims Court.

Other discretionary IRS decisions are routinely reviewed even though the statutes do not expressly state the standard of review. For example, the IRS "may" waive the §6659 valuation overstatement penalty, the §6660 valuation understatement penalty, and the §6661 substantial underpayment penalty. if the taxpayer establishes reasonable cause and good faith. [17] These §§6659, 6660, and 6661 penalties and other discretionary waivers are reviewed for abuse of discretion. *See Heasley v. Commissioner*, 902 F.2d 380 (5th Cir. 1990).

2. The Statute is Not Too General

The *Selman* court erroneously believed that the statute does not provide "any basis for distinguishing between the instances in which abatement should and should not be granted." *Selman* at 1063. It was persuaded by portions of the legislative history for §6404(e)(1) that state abatement should only "be utilized in instances where failure to abate interest would be widely perceived as grossly unfair," which it believed was too "amorphous" to provide a reviewing

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[17] All three penalties have since been repealed but remain applicable for tax returns due prior to 1990.

court with subjective standards by which to evaluate agency action. *Selman* at 1063. But the original legislative history illustrates the *Selman* court may have erred and leads directly to the approach taken by the Tax Court today, not to unfettered IRS discretion:

> The provision applies *only* to failures to perform *ministerial* acts that occur after the taxpayer has been contacted by the IRS . . . . The committee intends that the term "ministerial act" be limited to *nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors*, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law.

Horton Homes at 551, *quoting* Report of the Committee on Ways and Means of the House of Representatives on H.R.Rep. 3838, 99th Cong., 1st Sess. 844, 844-45 (1985). [Italicized emphasis in original, underlined emphasis added.]

Congress obviously believed §6404(e)(1) is straightforward and "errors or delays" is not too quixotic or generalized when it directed the Tax Court to review those same "errors or delays" in TBOR2.[18] Whether *Selman* was in error then, it is clearly inapplicable after TBOR2.

As the Tax Court has determined, the issue is whether an officer or employee erred or delayed *in performing a ministerial act.* See *Leffert* at 1097-98. By reading the statute in its entirety, the Tax Court avoided the truncated

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[18] In the 1996 amendments Congress inserted "unreasonable" before "errors and delays" and expanded the scope of the statute to include managerial acts as well. P.L. 104-168, §301(a)(1)-(2) of TBOR2. See the current version of §6404(e)(1). However, those amendments only apply to tax years after 1996 and not to this action. P.L. 104-168, §301(c) of TBOR2.

reading that led to the opinion of the *Selman* court.

Morevoer, the regulation includes detailed examples with explanations of the kinds of errors or delays in performing ministerial acts, the accrued interest for which the IRS should abate. Treas. Reg. §301.6404-2T(b)(1).

In *Horton Homes*, the Eleventh Circuit evaluated the merits of that case using the same approach set out in the regulation that the Tax Court uses today. *Horton Homes* at 552. *Horton Homes* concluded it was not possible to reach a final determination on the merits of the request for abatement based on the record in that appeal – not that the statute or regulatory definition was unworkable.

The issue is simply whether an officer or employee erred or was dilatory in performing a procedural or mechanical act. In the Tax Court, review is straightforward – did the taxpayer identify and support specific instances of IRS errors or delays in performing ministerial or managerial acts. If so, then it is an abuse of discretion for the IRS to refuse to abate interest. If not, then there is no abuse of discretion. *E.g.*, *Goblirsch v. Commissioner*, T.C.Memo. 2005-78; *Bartelma v. Commissioner*, T.C.Memo. 2005-64. The Fifth Circuit was not persuaded that district courts are less competent than the Tax Court to make this determination. The Claims Court is no less competent.

3. The "May" Versus "Shall" Distinction is Now Moot

Pre-TABOR2 authorities also determined that abatement was discretionary because it used the permissive "may." This argument is no longer persuasive. Congress directed the Tax Court to review §6404 abatement determinations without amending that term. Moreover, §6404(h) grants the Tax Court jurisdiction over interest abatement in "this section," which also includes §6404(a), (c), (d), (f), and (g). Several of these subsections also include the term "may," but no assertion that they are discretionary

has been made.

After *Brahms*, there has been a clarification, or subsequent change, in the law on this "may" vs. "shall" issue. This Court's holding in *Rodgers* clarified that "may" is no longer *per se* indicative of total discretion but implies some degree of discretion that can be defeated by indications of legislative intent to the contrary and by obvious inferences from the structure and purpose of the statute. 461 U.S. at 706.

Applied to §6404(e)(1), since TBOR2 the "may" in §6404(e)(1) is not *per se* determinative. Legislative intent, the structure of the statute, the extra ordinary expansion of the Tax Court's pre-payment jurisdiction to permit judicial review of the IRS's refusal to abate interest under §6404(e)(1), and the structure of the tax controversy scheme as a whole indicate §6404(e)(1) abatements cannot be totally discretionary. Consequently, §6404(e)(1) is money-mandating for purposes of establishing jurisdiction under §1491(a)(1) and is judicially reviewable despite the word "may." Consequently, the Tucker Act also supplies jurisdiction and a waiver of immunity over the action.

D. Total IRS Discretion Is Rare

The Tax Code is replete with examples of exacting procedures the IRS must follow and opportunities for taxpayers to be assessed with or relieved of tax, interest, or penalty liability. A simple word search of the Tax Code returns over 470 discretionary provisions in the Tax Code that state the "Secretary may." Sections 6659, 6660, and 6661 allow the IRS to abate penalties at the Secretary's discretion. Those discretionary abatements are routinely reviewed in civil suits in the Tax Court, district courts, and the Claims Court. *See Mailman v. Commissioner*, 91 T.C. 1079 (1988); *Heasley, supra.*

Counsel has been unable to locate *any* provisions in the

Tax Code perceived to be so totally discretionary that judicial review is barred. Section 7122 offers-in-compromise were once perceived to be completely discretionary and barred from judicial review. But that is no longer true, if it ever was. The Tax Court now reviews denials of §7122 offers-in-compromise submitted in a collection due process hearing under an abuse of discretion standard. §§6320 and §6330. *Lunsford v. Commissioner*, 117 T.C. 183, 185 (2001).

Section 7122(a) authorizes the IRS to "compromise any civil or criminal case arising under the internal revenue laws." This includes abatement of both tax and interest. §7122. Offers-in-compromise are a common method of attempting to obtain IRS tax and interest relief. This is probably part of what Congress was referring to in the history to TBOR2 when it acknowledged that "[f]ederal courts *generally* do not have jurisdiction to review the IRS's failure to abate interest." Emphasis added. However, in its ongoing attempt to make the IRS accountable when it fails to reasonably exercise provisions intended to grant taxpayer relief, Congress made the denial of an offer-in-compromise received in a newly created collection due process hearing under §§6320 and 6330 reviewable by the Tax Court before payment on an abuse of discretion standard. Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206; *Lunsford* at 194.

Relying on the same analysis as *Argabright*, *Selman*, and *Horton Homes*, the IRS had asserted that §6015(f) equitable innocent spouse relief was totally discretionary and judicial review was barred. But, in *Butler v. Commissioner*, 114 T.C. 276 (2000), the Tax Court rejected the IRS's argument that its authority to grant equitable relief was totally discretionary. See *Butler* at 290-91; *cf. In re Mira*, 245 Bankr. 788 (Bankr. M.D. Pa. 1999). It recognized that the "committed to agency discretion" exception to the general rule of judicial review is very narrow and applies only in those rare instances where the

statute is drawn in such broad terms that there is no law to apply. The Tax Court recognized that review of §6015(f) "does not involve political, economic, military, or other managerial choices not susceptible to judicial review." *Butler* at 291.

In *Butler*, the IRS also argued that there was no ascertainable standard upon which to review the discretionary denial of equitable relief. The Tax Court determined the "facts and circumstances" test set out in the plain language of §6015(f) did not differ from the "facts and circumstances test" used to evaluate claims under other Code sections. It held that: "accordingly, we are well equipped to decide whether it was an abuse of discretion for [the IRS] to deny relief to petitioner under §6015(f)." *Butler* at 291-292.

Subsequent opinions in the Tax Court and Claims Court all followed the *Butler* analysis and holding. *Fernandez v. Commissioner*, 114 T.C. 324 (2000); *Charlton v. Commissioner*, 114 T.C. 333 (2000); *Flores*, 51 Fed. Cl. 49 (2001). The IRS acquiesced and has abandoned this challenge to §6015(f). Chief Counsel Notice (6/5/2000) Change in Litigating Position.

VII. The Federal Circuit's Decision Denies Taxpayer's Due Process

Both Circuits recognized that repealing the existing §6404(e)(1) refund jurisdiction of the district courts and Claims Court would cause two anomalies: (i) a taxpayer's right to judicial review of the IRS's abatement denials would be determined solely by his net worth, and (ii) certain taxpayers would be forced to "split" their claims. Pet. App. 16-17, 36-37. Further, the plain language of the statutes authorizing Tax Court jurisdiction would even deny judicial review to most of those taxpayers who do meet the net worth requirements. The Federal Circuit found the first two anomalies acceptable and chose to ignore the third. But all

three violate taxpayer rights to constitutional due process.

A. The Federal Circuit's Interpretation Would Violate the Constitutional Due Process Rights of Many Taxpayers

Section 6404(h) limits Tax Court jurisdiction over §6404(e) claims to only "action[s] brought by a taxpayer who meets the requirements . . . in §7430(c)(4)(A)(ii)." Pet. App. 42. Section 7430(c)(4)(A)(ii) mandates the taxpayer meet "the requirements of [28 U.S.C.] §2412(d)(2)(B)." Pet. App.49. Section 2412(d)(2)(B) provides, *inter alia*, that "'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) [other entities, including corporations] the net worth of which did not exceed $7,000,000 at the time the civil action was filed . . . ." Pet. App. 54.

If §6404(h) gave the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, then individual taxpayers with a net worth of under $2,000,000 would be allowed judicial review in the Tax Court, but taxpayers with a net worth of over $2,000,000 "would be left entirely without recourse." Pet. App. 4, 16, 36 fn. 15, 37. The Fifth Circuit found this denial of rights based solely on personal wealth unacceptable. Pet. App. 37. In *Hinck*, the Federal Circuit rejected the Fifth Circuit's concerns and stated that by granting prepayment review in the Tax Court but restricting it to "certain taxpayers," Congress intended to deny taxpayers with a net worth of over $2,000,000 not only a prepayment forum but any forum whatsoever by simultaneously repealing the existing, *albeit* previously unavailable, refund jurisdiction of the district courts and Claims Court. Pet. App. 16.

The record in this case does not contain any findings regarding the Hincks' net worth. Nor were any such findings made in *Beall* or *Weiner*. There is nothing in any of these cases to indicate that these particular taxpayers, or

any other AMCOR partner, *could* have pursued their claim in the Tax Court.

But the Federal Circuit went further by ignoring that §2412(d)(1)(B) additionally restricts Tax Court jurisdiction to only taxpayers who "submit to the court an application for fees and other expenses which shows that the party is a prevailing party." Pet. App. 54.

The statutes plainly state that the Tax Court's §6404 jurisdiction is restricted to taxpayers who meet the net worth requirements *and*

> (i) are a "prevailing party" [§7430(c)(4)(A)] seeking "reasonable administrative costs" [§7430(a)(1)] and/or "reasonable litigation costs" [§7430(a)(2)] for "any administrative or court proceeding . . . in connection with the determination, collection, or refund of any tax, interest, or penalty under this title [26 U.S.C.];" [§7430(a)] and
>
> (ii) timely submit to the court their "application for fees and other expenses" showing the amount sought and that they are "a prevailing party." [§2412(d)(1)(B)]

Pet. App. 49, 54.

If these express restrictions are upheld as well as the net worth requirements, very few taxpayers will ever qualify for judicial review in the Tax Court.

Neither the Hincks, the Bealls, nor Weiner were "prevailing parties" seeking "fees and other expenses." Under the plain language of the statutes, all of them would have been barred from filing their §6404(e)(1) abatement refund claims in the Tax Court because theirs could not be claims over which the Tax Court could have jurisdiction, exclusive or otherwise.

The only courts with clear statutory authority over the partners' §6404(e)(1) claims were the district courts and the Claims Court under §1346(a)(1), §1491(a)(1), and §7422(a). Even if they met the net worth requirements, they would have been foolish to try to take their claims to the Tax Court given the plain language of the authorizing statutes.

It is unreasonable to believe that Congress intended to allow judicial review *only* to taxpayers with a net worth below $2,000,000. However, it is reasonable for Congress to establish limited pre-payment review in the Tax Court for those with a net worth below $2,000,000 and leave review for those with a more substantial net worth to the "pay and sue" remedy pursued here by the Hincks, and by the Bealls and Weiner. It is more unreasonable to believe that Congress intended to deny all judicial review to all taxpayers, even those who meet the net worth requirements, if they do not also meet the "prevailing party" requirements of §7430(c)(4)(A).

The Federal Circuit's interpretation results in an improper taking or conversion of the rights of certain taxpayers – individuals with a net worth over $2,000,000, probably most corporations, and all taxpayers who do not meet the "prevailing party" requirements of §7430(c)(4)(A) – to judicial review when the IRS denies their §6404(e)(1) abatement requests, and violates their substantive and procedural due process rights by denying them any forum in which to raise their claim. As a result, there would be no IRS accountability for denying almost all §6404(e)(1) abatement requests, particularly those made by high net-worth individuals and corporate taxpayers. *I.R.S. v. Blais*, 612 F.Supp. 700, 704 (D.Mass.1985) ("The law abhors power without accountability. Unpoliced power invites abuse and corruption.").

This is wholly inconsistent with the grant of relief under §6404(e)(1) being unrestricted to all taxpayers. The

restrictions only appear in §6404(h), which creates the grant of pre-payment jurisdiction to the Tax Court.

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution including: the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause, the Sixth Amendment, the Privileges and Immunities Clause of Article IV, and the First Amendment protection of the right to petition. *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148 (1907); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) (5th Amendment); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (14th Amendment); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (Equal Protection Clause); *Johnson v. Avery*, 393 U.S. 483 (1969) (6th Amendment); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000) (Privileges and Immunities); *Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (1st Amendment). The Due Process Clause of the 14th Amendment guarantees access to both state and federal courts. *DeWitt v.Pail*, 366 F.2d 682, 685 (9th Cir. 1966); *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 679-80 (1930). This right cannot be infringed upon or burdened. *Silver v. Cormier*, 529 F.2d 161, 163 (D.C.Colo. 1976), *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973). A court of competent jurisdiction is required for legal redress. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

Denying certain taxpayers *any* forum to raise their §6404(e)(1) abatement claim is improper when "under the law there is no other court to which they could go . . . [and] could amount to a denial of due process under the 14th amendment to the Constitution." *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct.Cl. 1977) *citing Boddie v. Conn.*, 401 U.S. 371, 377 (1971); *Xechem I'natl, Inc. v. Univ. of Texas*, 382 F.3d 1324, 1334-35 (Fed.Cir. 2004) concurring

opinion. (In an action for a taking or conversion "a factor in the due process provision of the 14th Amendment is whether any remedy is otherwise available. . . . [I]f no remedy is indeed available . . . by federal preemption of the cause of action – there can arise an affront to the fundamentals of due process."); *Benedict v. Sec. of Dept. of H.H.S.*, 29 Fed.Cl. 587, 594 (1993) ("[T]he guaranty of due process applies to the judicial branch as well as the legislative, executive, and administrative branches of government.").

The denial of any pre-payment or refund forum violates the well established rule that a pre-payment forum is unnecessary and "the availability to a taxpayer of a post-payment judicial forum in which to obtain a determination of his tax obligations is sufficient to satisfy due process requirements." *Barlow v. Commissioner*, 301 F.3d 714, 722 (6th Cir. 2002), *citing Phillips v. Commissioner*, 283 U.S. 589, 595 (1931).

B. "Claim-Splitting" is Prohibited

The Fifth Circuit recognized that certain plaintiffs would be forced to split their abatement claims from their refund claims if the district courts and the Claims Court cannot hear §6404(e)(1) claims. The Fifth Circuit acknowledged that claims splitting is generally considered undesirable. *Beall* at Pet. App. 37 *citing In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996).

The Federal Circuit again rejected the Fifth Circuit's concerns and stated:

> That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear.

Pet. App. 17.

But this Court has long recognized that such "claim-splitting" is improper because "the first decision would, of course, control." *Flora* II, 362 U.S. at 165. See also *United States v. Shanbaum*, 10 F.3d 305, 314 (5th Cir. 1994):

> "[A taxpayer's] total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation." *Finley v. United States*, 612 F.2d 166, 170 (5th Cir.1980). Thus, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year." *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

"To discourage [claim-splitting], judges award plaintiffs not the better outcome but the first outcome: whichever suit goes to judgment first is dispositive, and the doctrine of claim preclusion (*res judicata*) requires the other court to dismiss the litigation." *Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995).

By forcing taxpayers to split their claims, the Federal Circuit's interpretation would again cause an unlawful taking or conversion of the taxpayer's right to legal redress as to the claim not decided first. Here the issue is moot as to the Hincks and the Bealls since they were specifically chosen as the lead cases on the §6404(e) issue because §6404(e) was the only grounds for refund remaining in their cases. However, almost all of the AMCOR partners with refund suits pending are like Weiner, *i.e.* they filed their refund claims on multiple grounds for the same tax years.

C. Exclusive Tax Court Jurisdiction Would Leave Taxpayers at the Mercy of the IRS

The Federal Circuit's structural scheme restricting review of §6404(e)(1) denials to the Tax Court leaves taxpayers at the mercy of the IRS. Similar to a notice of deficiency, an IRS denial of a claim for abatement is a prerequisite to Tax Court jurisdiction over §6404 interest abatement claims. §6404(h)(1). But the statute granting the Tax Court jurisdiction over those claims does not provide a remedy if the IRS fails or refuses to issue a denial. As a result taxpayers who file claims for abatement of interest can be left with no right to judicial review in the Tax Court. *See Bourekis v. C.I.R.*, 110 T.C. 20, 26 (1998) ("[U]nder §6404(g) ... a notice of final determination not to abate interest is a prerequisite to the Court's jurisdiction and serves as a taxpayer's 'ticket' to the Tax Court."). In contrast, if the IRS fails or refuses to act on a claim for refund under §7422(a), then after six months taxpayers have the right to file an action in the Claims Court or district court. §6532(a)(1).

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully Submitted,

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FEBRUARY 2007

INDEX TO PETITIONER'S APPENDIX

Legislative History:

H.R.Rep. No. 99-426 (1985) 2

S.Rep. No. 99-313 (1986) 6

H.R.Rep. No. 179, 68th Cong., 1st Sess. 7 10

Chief Counsel Notice (6/5/2000).
Change in Litigating Position 15

Brief App. 2

House Report No. 99-426

99th Congress House of Representatives Rept. 99-426

1st Session

TAX REFORM ACT OF 1985

December 7, 1985.–Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. ROSTENKOWSKI, from the Committee on Ways and Means, submitted the following

REPORT

together with

[To accompany H.R. 3838]

together with

DISSENTING AND ADDITIONAL DISSENTING VIEWS

The Committee on Ways and Means, to whom was referred the bill (H.R. 3838) and reform the internal revenue laws of the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

(1)

pp. 2-843

Redacted

House Report No. 99-426 844

2. Authority to Abate Interest Due to Errors or Delay by the IRS

(§1322 of the bill and §6404 of the Code)

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS's long-established position that once tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unless the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a mathematical error of an IRS employee who assists taxpayers in preparing their income tax returns (sec. 6404(d)).

Reasons for Change

In some cases, the IRS has admitted that its own errors or delays have caused taxpayers to incur additional interest charges. This may even occur after the underlying tax liability has been correctly adjusted by the IRS or admitted by the taxpayer. The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, such as issuing either a statutory notice of deficiency or notice and demand for payment after all procedural and substantive preliminaries have been completed, authority should be available for the IRS to abate the interest independent of the underlying tax liability. The committee is especially concerned about IRS errors that cause taxpayers to receive much larger refunds than they are entitled to.

Explanation of Provision

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No aspect of

the delay can be attributable to the taxpayer. The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of erroneous refunds of less than $1 million, described below). The committee does not intend that this provision be used routinely to avoid payment of interest; rather, it intends that the provision be utilized in instances where failure to abate interest would be widely perceived as grossly unfair. The interest abatement only applies to the period of time attributable to the failure to perform the ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the taxpayer has been contacted by the IRS. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of

this interest regardless of how long the IRS took to contact the taxpayer and request payment.

The committee intends that the term "ministerial act" be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law. For example, an unreasonable delay in the issuance of a statutory notice of deficiency after the IRS and the taxpayer have completed efforts to resolve the matter would be grounds for abatement of interest.

Under its general authority to issue regulations, the IRS can issue regulations determining what constitutes a

reasonable time for performing various ministerial acts called for by the Code.

The committee intends that the IRS exercise this authority to abate interest in instances in which it issues an erroneous refund check. For example, it has come to the committee's attention that the IRS may make an error that causes a taxpayer to get a refund check for $1,000 instead of the $100 that the taxpayer rightfully claimed. In the past, the IRS charged the taxpayer interest on the $900 for the time period that the taxpayer held that money.

The committee believes that it is inappropriate to charge taxpayers interest on money they temporarily have because the IRS has made an error. Consequently, the committee instructs the IRS not to charge interest on these erroneous refunds. The committee intends that two limitations be placed on this rule. First, it is not to apply in instances in which the taxpayer has caused the overstated refund to occur, such as by overstating a claim for refund on a tax return. Second, it is not to apply to any erroneous refund checks that exceed $1 million.

Effective Date

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning in 1982. With respect to taxable years 1982, 1983, and 1984, the committee intends that taxpayers initiate a request that the IRS abate the interest and issue a refund. For taxable years following these years, the committee intends that the IRS offer on its own, in appropriate circumstances, to abate interest. Taxpayers may also request that the IRS abate interest.

Brief App. 6

Calendar No. 665

99th Congress
2nd Session

Senate

Report
99-313

TAX REFORM ACT OF 1986

May 29 (legislative day, May 19), 1985–Ordered to be printed

MR. PACKWOOD, from the Committee on Finance submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To Accompany H.R. 3838]

[Including cost estimate of the Congressional Budget Office]

pp.1-207 –

Redacted

Senate Report No. 99-313 208

3. Authority to Abate Interest Due to Errors or Delay by the IRS

(§552 of the bill and §6404 of the Code)

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS' long-established position that once a tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest

and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unless the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a mathematical error of an IRS employee who assists taxpayers in preparing their income tax returns (sec. 6404(d)).

Reasons for Change

In some cases, the IRS has admitted that its own errors or delays have caused taxpayers to incur additional interest charges. This may even occur after the underlying tax liability has been correctly adjusted by the IRS or admitted by the taxpayer. The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, such as issuing either a statutory notice of deficiency or notice and demand for payment after all procedural and substantive preliminaries have been completed, authority should be available for the IRS to abate the interest independent of the underlying tax liability.

Explanation of Provision

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No significant aspect of the delay can be attributable to the taxpayer. The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds of less than $1 million, described below). The committee does not intend that this provision be used routinely to avoid payment of interest; rather, it intends that the provision be utilized in instances where failure to abate interest would be widely perceived as grossly unfair. The interest abatement only applies to the period of time attributable to the failure to perform the

ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the IRS has contacted the taxpayer in writing. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment.

209 Senate Report No. 99-313

The committee intends that the term "ministerial act" be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law. For example, a delay in the issuance of a statutory notice of deficiency after the IRS and the taxpayer have completed efforts to resolve the matter could be grounds for abatement of interest. The IRS may define a ministerial act in regulations.

Under its general authority to issue regulations, the IRS can issue regulations determining what constitutes timely performance of various ministerial acts called for by the Code.

The IRS must abate interest in certain instances in which it issues an erroneous refund check. For example, it has come to the committee's attention that the IRS may make an error that causes a taxpayer to get a refund check for $1,000 instead of the $100 that the taxpayer rightfully claimed. In the past, the IRS charged the taxpayer interest on the $900 for the time period that the taxpayer held that money.

The committee believes that it is inappropriate to charge taxpayers interest on money they temporarily have because the IRS has made an error. Consequently, the IRS may not charge interest on these erroneous refunds until the date it demands repayment of the money. The committee intends that two limitations be placed on this rule. First, it is not to apply in instances in which the taxpayer (or a related party) has in any way caused the overstated refund to occur. Second, it is not to apply to any erroneous refund checks that exceed $1 million. If the taxpayer does not repay the erroneous refund when requested to do so by the IRS, interest would then begin to apply to the amount of the erroneous refund.

Effective Date

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning in or after 1982. With respect to taxable years 1982, 1983, and 1984, the committee intends that taxpayers initiate a request that the IRS abate the interest and issue a refund. For taxable years following these years, the committee intends that the IRS abate interest in appropriate circumstances. Taxpayers may also request that the IRS abate interest.

. . . .

[DEFICIENCY IN TAX.]

Sec. 271.(a). If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered (100) *mail, but such deficiency shall be assessed only as hereinafter provided.* Within <30> 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

Committee Reports

Report - Ways and Means Committee (68th Cong., 1st Sess., H. Rept. 179). - The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forced taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal to a determination of his liability for the tax prior to its payment.

Under the existing law a taxpayer prior to the

payment of his tax may appeal to the Commissioner, who has established the Committee on Appeals and Review, to determine these appeals for him. The objections that have been raised to this procedure are four: (1) The appeal is from the action of the Bureau of Internal Revenue but is taken to a committee in and a part of the bureau. It is urged that such an appeal does not involve a review by an impartial outside body, such as the taxpayer is entitled to prior to payment of the tax. (2) In the hearing on the appeal the person who is to decide the appeal acts both as advocate and judge, since he must both protect the interests of the Government and decide the questions involved. Such conditions do not insure an impartial determination of the case. (3) If the decision on the appeal is in favor of the Government, the taxpayer has the right to test the correctness of the decision in the courts, but if the decision is in favor of the taxpayer, the action of the bureau is final and the correctness of the decision can never be tested in the courts. It is contended that this condition results in the decision of most doubtful points in favor of the Government. (4) The taxpayer is usually forced to come to Washington for the hearing on his appeal, an expensive and burdensome procedure.

* * *

Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as both judge and advocate. The provision allowing the Commissioner to sue in court for the recovery of any taxes thought by him to be due in excess of that decided by

the board to be due relieves the board from the responsibility of finally passing upon questions involving large amounts and removes the necessity for a decision in favor of the Government in order to force the issues into court. The divisions of the board will sit locally throughout the united States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable. This proposal meets all the objections that have been raised s to the existing system and at the same time provides for a flexible and informal procedure which will permit the board to determine expeditiously the cases brought before it on appeal. (p.7-8)

This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in section 900 of the proposed act), in cases in which the Commissioner determined that there is a deficiency. (p.24)

Report - Conference Committee (68th Cong., 1st Sess., H. Rept. 844). - Same, except for clerical changes, as Ways and Means Committee Report. (p. 8-9, 30-31, respectively)

Report - Conference committee (68th Cong., 1st Sess., H. Rept. 844). - Amendment No. 100: This amendment makes a clerical change; and the House recedes. (p.23)

Congressional Discussion

Discussion - House (Cong. Rec. Vol. 65). - MR. GREEN of Iowa. * * * In the revision of the law a special effort was made to give the taxpayer a better opportunity to present his case when he thought the tax was being unjustly levied against him or being levied in too great an amount. For this purpose a board of tax appeals is created, to be appointed by the President and to hear the cases. (p.2429)

MR. CHINDBLOM. * * * It will be noted that there is now a committee on appeals and review, but this committee or divisions thereof merely act for and on behalf of the commissioner and report their findings to the commissioner, who thereupon takes final action, but of course in most cases his approval is a matter of form and routine. In fact, where he stops to give any consideration, he generally refers the case to his solicitor, who in his turn again acts for and on behalf of the commissioner. Through all of these proceedings the Treasury Department is the party in interest, the plaintiff or prosecutor, the court or jury, and the final beneficiary and the final judgment or decree creditor, and, it might be added, the sheriff or marshal serving execution and making collection. More than that, the person deciding the appeal is both advocate and judge, since he represents throughout the proceedings the department of the Government which is seeking the collection of the tax, while he also has the power to determine the rights and obligations of the taxpayer. In addition, under the present law an erroneous or prejudicial decision in favor of the Government still allows the taxpayer the opportunity, notwithstanding all those difficulties, of securing a review in the courts after payment of the tax, while a decision against the Government or in favor of the taxpayer leaves the department and the Government without any further recourse.

The further objection has been made that under the present law every taxpayer seeking relief even under present conditions must come to the National Capital to present his case. The bill seeks to remedy this complaint. (p.2684)

Amendment offered by MR. ALLEN: * * * insert "within 60 days after such notice has been received the taxpayer may file an appeal with the board of tax appeals established by section 900."

* * * *

MR. CHINDBLOM. I will say to the gentleman that as a matter of time we are not concerned about the difference between 30 days and 60 days, but as to the proposition that the law should provide a sufficient time after the notice has been received there is much danger in compelling the department to prove the actual receipt by the addressee.

* * * *

MR. CHINDBLOM. Of course, it has been held that proof of mailing is, prima facie, receipt of notice by the addressee. The department can know when it mails a letter, while it can not know when the addressee received it. The addressee may be away from home or he may have moved, and other things may have occurred which would make it unfair to compel the department to prove that the addressee received the letter.

MR. ALLEN. That could be remedied if you would strike out the word "received."

MR. CHINDBLOM. That can be done by changing the word to "thirty" to the word "sixty." (p.2969-70)

Discussion Senate (Cong. Rec. Vol. 65). On appeal to Board, in general. (p.8109-15)

Committee Hearings

Hearings - Senate finance Committee - Explanation of provision in relation to existing law. (A. W. Gregg - Treas. Dept. - p.24)

Providing for preliminary local hearing first. (G. C. Henckel, p.331)

Chief Counsel Notice (6/5/2000).
Change in Litigating Position

DOCUMENT NUMBER:	N(35)000-338 UIL 6015.00-00
SUBJECT:	Change in Litigating Position
CANCELLATION DATE:	Upon Incorporation into the CCDM

PURPOSE

The purpose of this Notice is to announce a change in the Service's litigating position with respect to whether the Service's determination that a spouse is not entitled to relief from joint and several liability under I.R.C. section 6015(f) is reviewable by any court. The Service now agrees that the Tax Court, the United States district courts (including the bankruptcy courts) and the Court of Federal Claims have jurisdiction to consider whether the Service abused its discretion in denying equitable relief under I.R.C. section 6015(f).

Section 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), Pub. L. No. 105-206, repealed I.R.C. section 6013(e) effective for all liabilities arising after July 22, 1998, and liabilities arising before July 22, 1998, that were unpaid as of that date, replacing that provision with new section 6015. Under the new statutory scheme, relief from joint and several liability can be obtained in one of three ways: under the more liberalized innocent spouse provisions of section 6015(b); under section 6015(c), limiting liability to the portion of the deficiency attributable to items allocable to the taxpayer; and, where a spouse fails to qualify under either of those subsections, by a grant of equitable relief from the Secretary under section 6015(f).

The Service unsuccessfully argued in the Tax Court that the Service's denial of a claim for equitable relief under section 6015(f)

was not subject to judicial review by any court in Butler v. Commissioner, 114 T.C. No. 19 (filed April 28, 2000); Fernandez v. Commissioner, 114 T.C. No. 21 (filed May 10, 2000); and Charlton v. Commissioner, 114 T.C. No. 22 (filed May 16, 2000). The Service will no longer contest the jurisdiction of the Tax Court, the United States district courts (including the bankruptcy courts) or the Court of Federal Claims to review, under an abuse of discretion standard, the Service's denial of equitable relief under section 6015(f). This change in litigating position was made public through the release of an action on decision (AOD) on May 12, 2000, acquiescing in the Tax Court's opinion in Fernandez. Fernandez v. Commissioner, AOD CC-2000-06 (May 12, 2000). This Notice is intended to clarify that the change in the Service's litigating position extends to all claims for relief under section 6015(f), regardless of whether an election has been made under section 6015(b) or (c).

The Tax Court does not consider a withdrawn motion as one that extends the time to answer under T.C. Rule 25(c). Accordingly, in light of the change in the Service's litigating position described above, in cases presently pending before the Tax Court in which respondent has filed a motion to dismiss (in whole or in part) for lack of jurisdiction with respect to the spouse's section 6015(f) claim prior to answer or in lieu of answer, district counsel attorneys should promptly file a Notice of No Objection to the Denial of Respondent's Motion to Dismiss For Lack of Jurisdiction stating that respondent no longer contests the Tax Court's jurisdiction with respect to the spouse's section 6015(f) claim and requesting the court to deny our motion. A sample Notice of No Objection is attached as Exhibit A. If the case has already been answered, then a Motion to Withdraw Respondent's Motion to Dismiss For Lack of Jurisdiction may be filed.

With respect to cases presently pending before the United States district courts (including the bankruptcy courts) or the Court of Federal Claims in which a motion to dismiss (in whole or in part) for lack of jurisdiction with respect to the spouse's section 6015(f) claim has been filed by the government, district counsel attorneys should send a letter to the Department of Justice requesting that the

Department of Justice take all steps necessary to implement the Service's change in litigating position described in this Notice, such as withdrawing its motion to dismiss for lack of jurisdiction.

District counsel attorneys are now authorized to make determinations regarding a spouse's entitlement to relief under section 6015(f) in cases within Counsel's jurisdiction.

Please contact the Procedural Branch of the Field Service Division at (202)622-7950 if you have any questions regarding this Notice.

/s/____

MARLENE GROSS

Deputy Chief Counsel (Operations)

EXHIBIT A

UNITED STATES TAX COURT

JOHN AND MARY DOE,	§	
Petitioners,	§	
v.	§	Docket: 0000-00
COMMISSIONER OF	§	
INTERNAL REVENUE,	§	
Respondent.	§	

NOTICE OF NO OBJECTION
TO DENIAL OF RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION [AND TO STRIKE]

RESPONDENT NOTIFIES the Court that respondent has no objection to the denial of respondent's Motion to Dismiss for Lack of Jurisdiction [and to Strike], filed in the above-entitled case on ____.

IN SUPPORT THEREOF, respondent respectfully states:

1. On ____, respondent filed a Motion to Dismiss for Lack of Jurisdiction [and to Strike] on the ground that the Tax Court lacks jurisdiction to review respondent's determination that a spouse is not entitled to equitable relief under the provisions of I.R.C. §6015(f).

2. Subsequent to the filing of respondent's motion, this Court in *Butler v. Commissioner*, 114 T.C. No. 19 (April 28, 2000), held that, in a case involving a petition for a redetermination of a deficiency, the Court has jurisdiction to review for abuse of discretion respondent's determination to deny a petitioner's request for equitable relief pursuant to section 6015(f). See also *Charlton v. Commissioner*, 114 T.C. No. 22 (May 16, 2000). Similarly, in *Fernandez v. Commissioner*, 114 T.C. No. 21 (May 10, 2000), the Court held that it had jurisdiction to review a determination denying section 6015(f) equitable relief in a case involving a petition for relief from joint and several liability brought under the provisions of I.R.C. §6015(e).

3. Respondent recently announced that the Internal Revenue Service acquiesces in the holding of the Court in *Fernandez, supra*, and stated that respondent will no longer contest the Tax Court's jurisdiction to review a request for innocent spouse relief under section 6015(f), when the requirements of section 6015(e) have been met. *Fernandez v. Commissioner*, AOD CC-2000-06 (May 12, 2000).

4. Accordingly, it is respondent's position that the Court has properly acquired jurisdiction in the instant case to review respondent's determination of petitioner's entitlement to section 6015(f) relief. It follows that respondent's motion to dismiss for lack of

jurisdiction [and to strike] should be denied.

5. Respondent's counsel has notified petitioners [petitioners, counsel] that respondent has modified his position with respect to the jurisdictional issue presented by respondent's motion to dismiss. Petitioners [Petitioners, counsel] has authorized respondent to represent that petitioners agree that respondent's motion should be denied on the basis set forth above.

WHEREFORE, it is prayed that respondent's Motion to Dismiss for Lack of Jurisdiction [and to Strike], filed ____ be denied.

STUART L. BROWN

Chief Counsel

Internal Revenue Service

By: ____
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OF COUNSEL:
Regional Counsel
District Counsel

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on ___ by mailing the same in a postage paid wrapper addressed as follows:

Petitioner [petitioners' counsel]
Address Line 1
Address Line 2
Dated: ___
By: ___
Attorney
Internal Revenue Service
T.C. Bar No.

270

27pp

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(6)

No. 06-376

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Argument 1

I. The Principles of Exclusivity Control this Case ... 1

A. Exclusive Tax Court Review Would Impliedly Repeal Existing Refund Jurisdiction in the Claims Court and District Courts 2

1. There is No Irreconcilable Conflict Here ... 2

2. Congress Had No Clear and Manifest Intent to Repeal the Existing Refund Jurisdiction of the Claims Court and District Courts 3

B. The *Preiser* Rule Does Not Apply Here 5

II. Anomalies Foreseen by the Fifth Circuit are Evident in this TEFRA Partnership-Related Case 13

A. No Agreement to Tax Liability 14

B. Claim Splitting 14

C. Net Worth 15

D. Prevailing Party 17

E. Preclusive Effect 18

F. Judicial Expertise 19

Conclusion 19

TABLE OF AUTHORITIES

Cases: Pa

508 Clinton Street Corp. v. C.I.R.,
89 T.C. 352 (1987) .....
Addington v. C.I.R.,
205 F.3d 54 (2nd Cir., 2000) .....
Avon Products, Inc. v. U.S.,
588 F.2d 342 (2nd Cir. 1978) .....
Bax v. C.I.R.,
13 F.3d 54 (2nd Cir. 1993) .....
Beall v. U.S.,
336 F.3d 419 (2003) 3, 4, 15, 16, 1
Block v. North Dakota,
461 U.S. 273 (1983) 5-7,
Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) .....
Boyd v. C.I.R.,
T.C. Memo 2000-16 .....
Branch v. Smith,
538 U.S. 254 (2003) .....
Brown v. G.S.A.,
425 U.S. 820 (1976) 5, 6,
Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) .....
Cook County, Illinois v. U.S.,
538 U.S. 119 (2003) .....
Copeland v. C.I.R.,
290 F.3d 326 (5th Cir., 2002) 1
Dodge v. Osborn,
240 U.S. 118 (1916) 1
Flora v. U.S.,
357 U.S. 63 (1958) 4, 10, 1
Georgia v. Pennsylvania R. Co.,
324 U.S. 439 (1945) .....
Golsen v. C.I.R.,
54 T.C. 742 (1970) 1

Hawksley v. C.I.R.,
80 T.C.M. 705 (2000) 16
Horton Homes, Inc. v. U.S.,
936 F.2d 548 (11th Cir 1991) 3, 4, 7, 8
J.E.M. Ag Supply, Inc. v.
Pioneer Hi-Bred Internat'l, Inc.,
534 U.S. 124 (2001) 1
Jean v. C.I.R.,
84 T.C.M. 436 (2002) 16
Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 6
Landvogt v. C.I.R.,
86 T.C.M. 108 (2003) 16
Lockhart v. U.S.,
126 S.Ct. 699 (2005) 2
Morton v. Mancari,
417 U.S. 535 (1974) 2-4
Nerad v. C.I.R.,
78 T.C.M. 795 (1999) 16
Pettyjohn v. C.I.R.,
82 T.C.M. 461 (2001) 16
Phillips v. C.I.R.,
283 U.S. 589 (1931) 17
Posadas v. Nat'l City Bank,
296 U.S. 497 (1936) 2
Preiser v. Rodriguez ,
411 U.S. 475 (1973) 1, 5-7, 9, 11, 12
Prizer v. U.S.,
11 Cl.Ct. 184 (1986) 18
Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1974) 2
Red Rock v. Henry,
106 U.S. 596 (1883) 4
Russell v. U.S.,
592 F.2d 1069 (9th Cir. 1979) 18
San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 17

Selman v. U.S.,
941 F.2d 1060 (10th Cir. 1991) 3, 7
Smith v. Robinson,
468 U.S. 992 (1984) 9,
Spurgin v. C.I.R.,
82 T.C.M. 841 (2001) .....
U.S. v. A. S. Kreider Co.,
313 U.S. 443 (1941) .....
U.S. v. Borden Co.,
308 U.S. 188 (1939) .....
U.S. v. Burroughs,
289 U.S. 159 (1933) .....
Univ. Interp. Shuttle Corp. v.
Washington Metro. Area Transit Comm'n,
393 US 186 (1968) .....
Watt v. Alaska,
451 U.S. 259 (1981) .....
Watts v. Hadden,
651 F.2d 1354 (10th Cir. 1981) 3, 1
Weiner v. U.S.,
389 F.3d 152 (5th Cir. 2004) 14, 1
Wood v. U.S.,
41 U.S.(16 Pet.) 342, 363, 10 L.Ed. 987 (1842) ....
Woodral v. C.I.R.,
112 T.C. 19 (1999) .....
Wright v. Roanoke Redevelopement & Housing Auth.,
479 U.S. 418 (1987)- .....
Zedner v. U.S.,
126 S.Ct. 1976 (2006) .....

Statutes:

26 U.S.C. §6213(a) 10
26 U.S.C. §6226 13
26 U.S.C. §6226(d) 13
26 U.S.C. §6226(f) 14
26 U.S.C. §6229(a) 14
26 U.S.C. §6229(d) 15
26 U.S.C. §6229(f) 13
26 U.S.C. §6231(b)(1)(C) 13
26 U.S.C. §6404 ..... 1, 3, 4, 7, 8, 10, 15, 17-19
26 U.S.C. §6404(a) 3, 8
26 U.S.C. §6404(a)(1) 8, 9
26 U.S.C. §6404(a)(2) 8, 9
26 U.S.C. §6404(a)(3) 8, 9
26 U.S.C. §6404(d) 8
26 U.S.C. §6404(e) 15
26 U.S.C. §6404(e)(1) 1, 3, 4, 6-8, 11-15, 17-19
26 U.S.C. §6404(e)(2) 3, 8
26 U.S.C. §6404(f) 8
26 U.S.C. §6404(g) 8
26 U.S.C. §6404(h) 1, 3, 4, 6, 8, 10, 12, 17-19
26 U.S.C. §6512(b) 18, 19
26 U.S.C. §6601 12
26 U.S.C. §6621(c) 14, 15
26 U.S.C. §6621(d) 15
26 U.S.C. §6659 11
26 U.S.C. §6660 11
26 U.S.C. §6661 11
26 U.S.C. §7422(a) 1, 18
26 U.S.C. §7430(c)(4)(A)(ii) 17
26 U.S.C. §7442 ..... 6, 10
26 U.S.C. §7481(c) 10
26 U.S.C. §§6221-6234 13
28 U.S.C. §1346(a)(1) 1, 4, 6-9, 18
28 U.S.C. §1491(a)(1) 1, 4, 6-9, 18
28 U.S.C. §2412(d)(1)(B) 17

Taxpayer Bill of Rights II 7,

Rules and Regulations:
Treas. Reg. §301.6404-2T(a)(2) .....

Legislative History:
H. Rept. 99-426 (1985),
1986-3 C.B. (Vol. 2) 1 .....
H.R. Conf. Rep. 99-841,
2nd Sess. II-810,
1986-3 C.B. Vol. 4,
1986 WL 31988 7,
H.R.Rep. No. 101-247, (1989),
reprinted in 1989 U.S.C.C.A.N.1906 .....
H.Rep. 104-506,
2nd Sess. 22, 1996-3 C.B., 70 .....
S. Rept. No. 99-313 (1985),
1986-3 C.B.(Vol. 3) 1 1

REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I. The Principles of Exclusivity Control this Case

At issue is whether §6404(h) gave the Tax Court exclusive review over *all* §6404 claims. If so, then it repealed by implication the, then-recognized, §§1346(a)(1), 1491(a)(1), and 7422(a) *refund* jurisdiction of the United States Court of Federal Claims ("Claims Court") and the district courts over §6404(e)(1) and other §6404 claims.

When addressing two statutes that appear to conflict or overlap, this Court first addresses the doctrine of implied-repeal for congressional intent and to see if the statutes can co-exist. Only if they cannot co-exist in harmony and Congress did not clearly intend to repeal the earlier statute will this Court then turn to other maxims of statutory construction. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Internat'l, Inc.*, 534 U.S. 124, 143-44, 155-56 (2001).

Instead, the United States relies on the *Preiser* Rule to assert that Claims Court and district court refund jurisdiction has been preempted by §6404(h) – "a precisely drawn, detailed statute preempts more general remedies" – which is a principle of exclusivity applied almost exclusively in civil rights and quiet title actions. *Preiser v. Rodriguez* , 411 U.S. 475 (1973). That maxim uses an analytical approach similar to implied repeal, but is inapplicable here and, even when applied, proves §6404(h) did not preempt Claims Court and district court refund jurisdiction over §6404(e)(1) abatement claims.

A. Exclusive Tax Court Review Would Impliedly Repeal Existing Refund Jurisdiction in the Claims Court and District Courts

An implied repeal will only be found where provisio in two statutes are in "irreconcilable conflict" or, thou inapplicable here, where the latter covers the whole subje of the former and "is clearly intended as a substitut *Branch v. Smith*, 538 U.S. 254, 273 (2003), *quoting Posad v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

"[R]epeals by implication are not favored." *Univ. Inter Shuttle Corp. v. Wash. Metro. Area Transit Comm'n*, 3 U.S. 186, 193 (1968). There is a "powerful presumptio against and this Court requires "strong support" to find implied repeal. *Lockhart v. U.S.*, 126 S.Ct. 699, 704 (200 *Zedner v. U.S.*, 126 S.Ct. 1976, 1989 (2006). In 2003, Justi O'Connor surveyed the history of this Court and could fi no "implied repeal of a statute since 1975. ... [a]nd outsi the antitrust context, [none] since 1917." *Branch*, at 27 O'Connor, J., concurring in part, dissenting in part. Nor c Counsel find any since.

1. THERE IS NO IRRECONCILABLE CONFLICT HERE

When two statutes are capable of co-existing, it is t duty of the courts to regard each as effective, *Radzanow v. Touche Ross & Co.*, 426 U.S. 148, 155 (1974), citi *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and t presumption is that the earlier is intended to remain force. *U.S. v. Burroughs*, 289 U.S. 159, 164 (1933). Impli repeal will be found only if necessary to make the lat statute work, and then "only to the minimum exte necessary." *Radzanower* at 155. "The better reading is give each provision a separate sphere of influence." *Branc* at 296, O'Connor, J., concurring in part, dissenting in par "Redundancies across statutes are not unusual events i drafting, and so long as there is no 'positive repugnanc between the two laws ... a court must give effect to bot

Connecticut Nat'l Bank v. Germain , 503 U.S. 249, 253 (1992), *citing Wood v. U.S.*, 41 U.S.(16 Pet.) 342, 363, 10 L.Ed. 987 (1842)). Further, the rules against implied repeals have even greater force where repeal is implied not from the enactment of an independent statute, but from revisions of portions of statutory schemes. *Watts v. Hadden*, 651 F.2d 1354, 1382 (10th Cir. 1981).

There is no positive repugnancy between the §6404(h) grant of jurisdiction to the Tax Court and the existing refund jurisdiction of the Claims Court and district courts *unless* the Tax Court's jurisdiction is deemed exclusive.[1] In *Beall* the Fifth Circuit recognized that "the more natural interpretation of §6404(h) is that Congress simply chose to extend concurrent jurisdiction to the Tax Court over a certain class of claims." *Beall v. U.S.*, 336 F.3d 419, 429 (2003).

1. CONGRESS HAD NO CLEAR AND MANIFEST INTENT TO REPEAL THE EXISTING REFUND JURISDICTION OF THE CLAIMS COURT AND DISTRICT COURTS

Where two overlapping statues can co-exist harmoniously within the established statutory scheme, then an implied repeal will only lay where there is "a clearly expressed congressional intention." *Mancari*, at 551. Congressional intent to repeal must be "clear and

---

[1] Tax Court jurisdiction under §6404(h) applies to the IRS's failure to abate interest under any of the subsections of §6404, and is not limited to abatements under §6404(e)(1). For example, the Tax Court has jurisdiction under §6404(h) to hear an appeal regarding §6404(a) abatement claims. *Woodral v. C.I.R.*, 112 T.C. 19 (1999). This includes abatements of interest accrued on income taxes. *Boyd v. C.I.R.* , T.C. Memo 2000-16. Both *Selman v. U.S.*, 941 F.2d 1060 (10th Cir. 1991) and *Horton Homes, Inc. v. U.S.* , 936 F.2d 548 (11 th Cir 1991) found refund jurisdiction but held that review of (e)(1) cases was precluded because that provision was discretionary, and noted that, by comparison, review of a §6404(e)(2) case was not so precluded.

manifest." *U.S. v. Borden Co.*, 308 U.S. 188, 198 (193
quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883).

Congress made no clear, manifest expression of inte
to repeal the then-existing §6404 refund jurisdictio
including §6404(e)(1) refund jurisdiction, of the Clain
Court and the district courts when it enacted §6404(h). Tl
legislative history said no inferences should be drawn. Pe
App. 63. "Inferring repeal from legislative silence
hazardous at best" and increases the possibility for erro
Cook County, Illinois v. U.S., 538 U.S. 119, 132 (2003).

Not only was repeal not clearly manifest, but, as th
Fifth Circuit recognized, by enacting §6404(h) Congre
removed the barriers to district court review upon which th
Horton Homes cases relied. *Beall* at 428. Subsequent
1996, it can no longer be asserted that §6404(e)(1) refun
determinations are totally discretionary and, thus, th
Claims Court and district courts are no longer preclude
from exercising their refund jurisdiction over those claim

In the absence of some affirmative showing of intent
repeal, the only permissible justification for a repeal b
implication is when the two statutes are irreconcilabl
Mancari, at 551, *citing Georgia v. Pennsylvania R. Co.*, 32
U.S. 439, 456-457 (1945). Here §§1346(a)(1), 1491(a)(1), an
6404(h) fit within traditional complementary scheme of ta
controversy jurisdiction articulated in *Flora v. U.S.*, 35
U.S. 63, 74 (1958). The Claims Court and district court
have refund jurisdiction and the Tax Court has pre
payment jurisdiction over §6404 claims, includin
§6404(e)(1) claims. Because there is no express, explic
language or even indication that Congress intended anothe
jurisdictional scheme, a repeal by implication cannot lay.

Moreover, none of the authorities cited by the Unite
States in response and in support of implied repeal
§1346(a)(1) and 1491(a)(1) refund jurisdiction ove
§6404(e)(1) claims are implied repeal cases. The Unite

States' implied repeal authorities are all *Preiser* Rule cases.

A. The *Preiser* Rule Does Not Apply Here

To avoid the disfavored doctrine of implied repeal, the United States asserts the *Preiser* Rule, which does not apply in a case such as this.

The *Preiser* Rule cases, including the authorities cited by the United States (with the exception of the two tax cases), address whether a later statute or statutory scheme preempts common-law or inapplicable statutory remedies. In those cases, claimants (for various reasons including seeking enhanced damages, avoiding expired statutes of limitation, or avoiding burdensome administrative requirements) rely not on the particular statute in question but on other, more general remedies to obtain relief. *See e.g., Block v. North Dakota*, 461 U.S. 273, 280, 281-2 (1983); *Brown v. G.S.A.*, 425 U.S. 820, 826-828 (1976).

These "artful pleadings" had been asserted in the past because there had been no statutory cause of action and/or effective judicial enforcement mechanism. Over time, these alternative remedies were found to be fatally flawed for two basic reasons: (i) the earlier statutory authority upon which the action was brought did not encompass the claim at issue, or (ii) the statutory and/or common-law causes of action lacked a waiver of sovereign immunity and/or grant of jurisdiction. *See e.g., North Dakota*, 461 U.S. at 281-2 (no waiver of immunity prior to passage of the Quiet Title Act ("QTA") and judicial narrowing of the scope of "officer's suits" circumscribed that cause of action); and *Brown*, 425 U.S. at 826-28 (§717 of Title VII did not protect federal employees, administrative remedies were ineffective because immunity had not been waived, and there was no jurisdictional basis to support suit on alternative remedies).

The *Preiser* Rule addresses whether enactment of a more precisely drawn, detailed statute preempts these more

"general," "artfully pled" remedies. But the *Preiser* Ru does not *per se* establish that a later "precisely drawn ar detailed statute preempts more general remedies." *E.g Brown*, at 833, *citing Johnson v. Railway Express Agenc* 421 U.S. 454 (1975)(distinguishing an earlier case that he Title VII was not exclusive because sovereign immunity ha been waived for other remedies and legislative histo manifest intent to allow individuals to also pursue oth state and federal statutory remedies). The key issue, as evident from *Brown*, *North Dakota,* and other *Preiser* Ru cases, is whether Congress intended the later-enacte statutory cause of action to comprehensively supplant th other inapplicable and/or flawed remedies.

The initial consideration in making that determinatio is whether Congress believed, at the time it enacted th more precise, detailed statute, that no remedy existed at a or the other remedies were *fundamentally* flawed becaus they lacked a waiver of immunity or grant of jurisdictio *E.g., North Dakota* , at 285. The answer to that questio proves the *Preiser* Rule has no application in this case.

The unanimous judicial determination prior to §6404(h was the Tax Court lacked jurisdiction over §6404 claim including §6404(e)(1) claims. This was because there was n express jurisdictional grant in the Tax Code as required b §7442 and abatement claims were not encompassed by an of the Tax Court's other jurisdictional grants. *See 50 Clinton Street Corp. v. C.I.R.* , 89 T.C. 352 (1987 Consequently, § 6404 actions in the Tax Court wer fundamentally flawed.

However, an alternative statutory mechanism fo judicial access did exist prior to enactment of §6404(h), pay-and-sue refund claim based on §§1346(a)(1) an 1491(a)(1) jurisdiction. Every court to reach the issu recognized that interest accrued as a result of IRS errors o

delays fit squarely within the scope and language of §§1346(a)(1), 1491(a)(1), and 7422, which waived sovereign immunity and established jurisdiction over those §6404(e)(1) claims. The United States has not challenged that underlying refund jurisdiction determination. Moreover, under the *Selman* and *Horton Homes* analysis, the other "shall abate" §6404 subsections faced no impediment to a refund action once paid.

Preiser Rule determinations also turn on the policy reasons and purpose underlying the statute at issue. *See Preiser* at 489-90; *North Dakota*, at 283-4. Here, there is no evidence that Congress had a specific policy it was trying to achieve or special purpose it was trying accomplish by preempting (or repealing) Claims Court or district court refund jurisdiction over abatement claims. To the contrary, the stated policy and purpose behind the original enactment of §6404(e)(1) and the general purpose of the 1996 amendments was to expand taxpayer rights and remedies.

In 1986, §6404(e)(1) was enacted with the stated purpose of giving the IRS a tool to abate excessive interest accrued as a result of IRS errors or delays – which the IRS had refused to do. H.R. Conf. Rep. 99-841, 2nd Sess. II-810, 1986-3 C.B. Vol. 4, 810, 1986 WL 31988, **4898-9. Ten years later, as a part of the aptly titled Taxpayer Bill of Rights II ("TBOR2"), Congress revisited the interest abatement issue in the context of comprehensive legislation aimed at *increased* protection of taxpayer' rights in complying with the tax laws and in dealing with the IRS. H.Rep. 104-506, 2nd Sess. 22, 1996-3 C.B., 70. It would be inconsistent with the stated purpose of this legislation to *narrow* judicial review of IRS abatement denials by preempting refund jurisdiction over abatement claims.

Preemption of refund jurisdiction over §6404 claims would also, for the first time, require a completely ludicrous splitting of the litigation of an abatement review under

§6404(a), which refers to abatements of tax liabilities whe the tax liability (including interest) is excessive, assess after the statute of limitations expired, or is erroneously illegally assessed. If exclusive, a taxpayer would have challenge the failure to abate the interest in the Tax Cou and sue for refund of the tax after payment in Claims Cou or district court, where jurisdiction already exists over bo the tax and interest refund portions. This outcome contrary to the general intent behind TBOR2.

The legislative history specific to §6404(h) lacks ar evidence that Congress intended to provide a new schem that would supplant Tax Court jurisdiction over existin Claims Court and district court refund jurisdiction wit respect to §6404 claims. That history begins with statement of current law – "[f]ederal ***courts*** generally d not have the jurisdiction to review IRS's failure to abat interest."[Emphasis added]. H.R.Rep. No. 104-506, at 2 (1996). Pet.App. 62-3.

This statement is true on its face with respect to th Tax Court.

This statement may even be construed as reasonabl accurate, despite the misuse of the term "jurisdiction based on the determination that §6404(e)(1) abatement wa totally discretionary with the IRS. This determination ha been made not only with respect to the Claims Court an the district courts, but also with respect to the Tax Court *Bax v. C.I.R.* , 13 F.3d 54, 58 (2 nd Cir. 1993)(extendin *Selman* and *Horton Homes* preclusion to Tax Cour jurisdiction, if any).

This statement is also accurate for pre-paymen jurisdiction to review a denied abatement request unde §§6404(a)(1), (2), and (3); §6404(d); §6404(e)(2); §6404(f); o §6404(g), some of which are mandatory. But for thes provisions (other than §6404(g) enacted in 1998), the ol pay-and-sue remedy under §1346(a)(1) and/or §1491(a)(1)

was available. Any claim for abatement of unpaid interest under §6404(a)(1), (2), or (3), once paid, becomes nothing more than a routine refund claim under §1346(a)(1) and 1491(a)(1). And, as *Selman Horton Homes* both noted, §6404(e)(2) abatements are not discretionary.

The remainder of the *Preiser Rule* analysis turns on whether the statute is "precisely drawn [and] detailed," which may reflect Congressional intent to make the new enactment a comprehensive, exclusive remedy and foreclose other remedies. *Preiser*, 411 U.S. at 489. The question is whether the statutory framework of the later act is so comprehensive and complete that allowing claimants to bring an action under more general remedies would be inconsistent with that carefully tailored new scheme and leave it superfluous.

Congressional intent to comprehensively supplant more general remedies must be express, must be supported by clear and convincing evidence, and the burden of proving that Congress has expressly withdrawn the more general remedy is on the defendant. *Smith v. Robinson*, 468 U.S. 992, 1012 (1984); *Wright v. Roanoke Redevelopement & Housing Auth.*, 479 U.S. 418, 423 (1987). The United States has not met that burden here.

Some of the factors reviewed in that respect include: the size and complexity of the statute, whether provisions of the statute indicate a specific Congressional purpose that would be thwarted by allowing more general remedies, and the "balance, completeness and structural integrity" of the statute.

For example, in *Brown*, the Court examined §717 of Title VII of the Civil Rights Act of 1964, a complex provision that created a new cause of action allowing federal employees, *for the first time*, to sue the government in discrimination cases. The statute created a new commission with extensive, specific enforcement powers and created

rigorous, exhaustive administrative requirements and tir limitations that governed those actions, including multip layers of administrative review and multiple limitatio periods for filing suit. The statute stated that the provisio regarding judicial review shall govern action brought und that section of Title VII. The Court commented that "[would require the suspension of disbelief to ascribe Congress the design to allow its careful and thorou remedial scheme to be circumvented by artful pleading."

In *North Dakota*, the Court examined the Quiet Tit Act, another lengthy statute designed to replace the mo general "officer suit" remedy, which lacked a waiver immunity. The QTA is comprised of multiple subsectio specifically negotiated between Congress and the Justi Department to achieve specific goals, including: limiting tl waiver of immunity by excluding certain lands, allowing tl option of money damages instead of surrendering propert making the remedy prospective only, and shortening tl limitations period.

Here, §6404(h) was necessary because §7442 requir Tax Court jurisdiction to be expressly set out in the Ta Code. That provision is only one sentence long, with thr short "Special Rules." While the terms in that provision a detailed, even a cursory survey of other Tax Cou jurisdictional grants makes it clear that they a consistently precise and excruciatingly detaile *E.g.*, §6213(a) and 7481(c).

The specific terms of §6404(h) do not evidence ar intent to create a new scheme to supplant the we established pre-payment post-payment scheme recognize in *Flora*. Nor is there any evidence of intent to replace tl refund claim alternative for all §6404 abatement actions.

For example, the 180 day limitations period consistent with the existing scheme of shorter limitatio periods for seeking pre-payment review in the Tax Court

Moreover, the direction to review IRS abatement denials for abuse of discretion is not indicia of a new scheme, but a codification of the existing, common-law standard used to review IRS determinations*E.g., Copeland v. C.I.R.*, 290 F.3d 326, 332 (5th Cir., 2002).

In 1986, Congress enacted §6404(e)(1) but did not expressly identify a standard by which to review IRS abatement denials. The *Selman* and *Horton Homes* cases found this lack of a standard for review to be indicative of total discretion.

But Congress has historically not expressly set out the standard to use in reviewing IRS determinations. Previous penalty provisions, did not specify the standard of review. §§6659, 6660, and 6661. In 1989, Congress replaced those penalties, among others, with a single penalty, §6662, partially to "eliminate" the IRS's habit of "stacking" multiple penalties on a single deficiency. *See* H.R.Rep. No. 101-247, at 1388 (1989), *reprinted in* 1989 U.S.C.C.A.N.1906, 2858-59. Congress again saw no need to state the standard for judicial review of that penalty. Nonetheless, IRS penalty determinations are reviewed for abuse of discretion. *E.,g., Addington v. C.I.R.*, 205 F.3d 54, 62 (2nd Cir., 2000).

Codification of the abuse of discretion standard was a response to *Selman* and *Horton Homes*, not evidence of a new scheme or statutory framework. No additional statutory provision was or is necessary to establish the standard of review for the Claims Court and district courts now that Congress has clarified that the familiar abuse of discretion standard is to be applied to all §6404 abatement claims.

As with implied repeal, the *Preiser* Rule should not be lightly used when the "new" statute is not independent, but a revision to an existing statutory scheme. *Watts*, 651 F.2d at 1382. The "balance, completeness and structural

integrity" of §6404(h) cannot be properly determin without considering the jurisdiction of the Tax Court, t Claims Court, and the district courts in the existing t controversy scheme. Under that scheme, the Tax Court h pre-payment jurisdiction over tax matters and the Clair Court and district courts have post-payment refu jurisdiction over those same tax matters.

The government erroneously asserts this scheme has place in §6404(e)(1) jurisdiction because abatement excessive interest is collateral to or incident to t underlying liability. But as explained in the Hincks' openi brief, by statute interest is a part of tax. §6601. Intere determinations, especially excessive intere determinations, are integral to the substanti determination of the amount of the liability and are n incident to the substantive liability.

The factors for determining whether a "specific statu preempts more general remedies," are not limited to impli repeal or *Preiser* Rule determinations. When faced with tv competing statutes of limitation, the Court has used the factors to determine which controls. *U.S. v. A. S. Kreid Co.*, 313 U.S. 443 (1941). But the United States overstat *Kreider* and *Romani*[2] to assert they are tax applications the *Preiser* Rule. In both cases, the Court did not hold th one tax related statute impliedly repealed or preempt another, but used the factors to harmonize the two statute

The same harmony can only be reached here b interpreting §6404(h) to grant the Tax Court pre-payme jurisdiction and the Court of Claims and district cour post-payment jurisdiction over §6404 claims, includi §6404(e)(1) claims.

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[2] *Smith v. Robinson* is not a tax case.

II. Anomalies Foreseen by the Fifth Circuit are Evident in this TEFRA Partnership-Related Case

This is a TEFRA partnership-related case, which explains why many of the United States' assertions are factually and legally incorrect.[3]

The Hincks were parties to the §6226 TEFRA partnership-level case for 1986. Pet. App. Supp. 78. In a §6226 TEFRA partnership-level case the Tax Court can only adjust and allocate partnership items. §6226(f). It cannot make tax determinations. The Hincks ceased to be parties to that case when they settled their partnership items with the IRS. §§6226(d), 6229(f), 6231(b)(1)(C).

Under TEFRA, once a partner's partnership items are adjusted, by Tax Court decision or agreement, as here, the IRS may generally compute the resulting tax and interest liabilities, if any, and assess them without further opportunity for pre-payment review as it did to the Hincks. The IRS first notified the Hincks of their liability in 2000, 13 years after their 1986 return was filed and years after 1989-1993, the abatement period they seek under §6404(e)(1). Generally, a TEFRA partner cannot contest whether the IRS properly applied the adjustments or made other errors in recomputing and assessing the liabilities until he has paid them in full and filed a refund claim.[4] He may then raise these issues, for the first time, in refund litigation, as the Hincks did here.

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[3] The partnership procedures codified at 26 U.S.C. §§6221-6234, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 and as thereafter amended.

[4] Since 1999, a new, very limited pre-payment venue review may be available via a collection due process (CDP) hearing before a levy is issued or after a lien is filed against a taxpayers assets. §§6320 and 6330.

C. No Agreement to Tax Liability

The United States errs in stating that the IRS "ma an agreed adjustment to petitioners' 1986 [tax] liabilit The Hincks agreed to adjust their partnership items. Tl United States makes the common error of referring to a agreement to adjust partnership items as an agreement a tax liability. There was no agreement as to the ultima tax liability.

D. Claim Splitting

The United States may be technically correct when says that most "taxpayers litigate their tax disputes in tl Tax Court, and those taxpayers must split their claims any event, since an interest abatement claim does not ripe until after the Tax Court has determined that a deficien exists." But this is simply not true in TEFRA cases. In tl Hincks' partnership-level case, the Tax Court could on adjust and allocate partnership items. §6226(f). It could n determine their tax deficiency. The IRS then assessed tl tax and interest without further pre-payment opportuni for Tax Court review. The Hincks' only recourse to mathematical or substantive assessment error was to pa and sue for refund, as here and in the other AMCOR case In addition to the §6404(e)(1) claim common to all AMCO plaintiffs, *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004), al addressed a §6229(a) limitations claim and §6621(c) penal interest claim.

TEFRA partners would not be forced to "split the claims in any event" between their pre-payment bases f tax abatement and their post-payment §6404(e)(1) bases f interest abatement, as asserted by the United State because they could challenge the tax and intere assessments *only* in refund litigation. But if the Tax Court jurisdiction over §6404(e)(1) claims is exclusive, they woul be forced to split off their §6404(e) ground for refund fro any other grounds they might have that could or must l

pursued in the Claims Court or district courts. That would mean splitting the §6404 claims from the limitations claims, the §6621(c) penalty interest claims, and any other partner-specific claim bases, *e.g.* §6229(d) untimely assessments, and erroneous interest computations based on the doctrine of *Avon Products, Inc. v. U.S.*, 588 F.2d 342 (2nd Cir. 1978) or §6621(d) interest netting.[5]

B. Net Worth

The United States asserts on an erroneously narrow interpretation of §6404(e) to argue that wealthy taxpayers should not be allowed a refund forum to pursue their §6404(e)(1) claims because they can avoid any IRS errors or delays as to interest by simply paying the tax as soon as the IRS notifies them of the deficiency so that "further interest does not accrue." This misapplies the well established meaning of the phrase, "after the IRS contacts the taxpayer in writing with respect to such deficiency or payment." Congressional intent, IRS regulations, numerous Tax Court holdings, and *Beall*, the authority cited by the United States, all hold that §6404(e) claims apply to errors and delays after the IRS notified a taxpayer that his return had been selected for examination, not only after the IRS concluded an examination and notified the taxpayer of the amount due. S. Rept. No. 99-313 (1985), 1986-3 C.B.(Vol. 3) 1, 208; H. Rept. 99-426 (1985), 1986-3 C.B. (Vol. 2) 1, 844; and Conf. Rept. 99-841 (1985), 1986-3 C.B. (Vol.4) 1, 811. The Hincks, like other AMCOR partners, seek abatement for errors and delays after the IRS's first written notice of the commencement of an examination was made in late 1988 or early 1989, depending on the partnership, long before the IRS notified them of their "deficiency" many

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[5] The Hincks and Bealls were chosen to lead this §6404(e)(1) issue because they, almost uniquely among the AMCOR plaintiffs, asserted no other grounds for refunds.

years later. IRS regulations and legislative histo illustrate that errors or delays after the IRS notifies taxpayer in writing that it has selected a return for audit commenced an audit apply. Treas. Reg. §301.6404-2T(a)(2 *Examples (1) - (5)* . The Tax Court follows this approac *Landvogt v. C.I.R.*, 86 T.C.M. 108 (2003); *Jean v. C.I.R.*, T.C.M. 436 (2002); *Hawksley v. C.I.R.*, 80 T.C.M. 7((2000); and *Nerad v. C.I.R.*, 78 T.C.M. 795 (1999). Whe there was no "audit" in the usual sense, the IRS's deficien notice can be the first written contact. *Pettyjohn v. C.I.I* 82 T.C.M. 461(2001); *Spurgin v. C.I.R.*, 82T.C.M. 841(200

An ongoing question in TEFRA cases is which noti suffices, notice to the partnership or notice to the individu partner. The Claims Court has not ruled on this questio

The Hincks' only pre-payment route to the Tax Cou would have been to not pay the tax and intere assessments, wait (possibly for years while intere accrued) for the IRS to threaten them with levies or to fi a lien on their property and request a CDP hearing. F AMCOR partners assessed before 1999, even that was n available. *Weiner*, (1984 liabilities assessed in 1997); *Bea* (1984 liabilities assessed in 1997). The Hincks could n have avoided the interest by paying in 2000 when they we "first notified by the IRS that additional taxes are owed." fact, the Hincks did try to mitigate any potential interest l remitting roughly $94,000.00 to the IRS in 1996. But th wildly overestimated what they would eventually ov because they had no way to know what their final t liability would be.[6]

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[6] For AMCOR partners like the Hincks who settled on Forms 87 P(AD), the final tax liabilities were generally about half of what th would have been without the settlement. In 1996 the Hincks had no w to know what terms the IRS would settle on years later.

This Court has held that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973). Congress intended §6404(h) to allow pre-payment relief for "certain taxpayers," those with a net worth under $2,000,000. Relief for wealthier taxpayers would be restricted to pursuing post-payment refund claims in the Claims Court and district courts. But this Court has also held that a tax assessment without a prior hearing does not violate due process provided the taxpayer can sue for a refund after payment, and meets the minimal requirements for due process. *Bob Jones Univ. v. Simon,* 416 U.S. 725,746 (1974); *Phillips v. C.I.R.,* 283 U.S. 589, 595 (1931); *Dodge v. Osborn,* 240 U.S. 118, 122 (1916). That is all that the Hincks request.

But the United States advocates that this Court go further and establish exclusive Tax Court jurisdiction over all §6404 claims, thereby depriving many taxpayers of *any* forum to pursue otherwise available, even mandatory abatement relief, solely based on their wealth. This does not meet the minimum requirements for due process.

There is also no rational relationship in a TEFRA related case between the net-worth test and the role of interest in tax administration. Nor is denying taxpayers *any* forum to pursue their otherwise available §6404 claims based solely on their wealth is clearly in any way comparable to limiting the taxpayers who may be reimbursed for attorneys fees under §7430.

c. Prevailing Party

The Hincks agree that in the context of §6404(e)(1) claims the "prevailing party" language of 28 U.S.C. §2412(d)(1)(B) is a *non sequitur* and should not apply. But until Congress revises the language of §7430(c)(4)(A)(ii) it appears to be the law and will continue to present a potential bar to most taxpayers seeking pre-payment Tax

Court review of their denied §6404(e)(1) claims. The I
has never yet asserted that partners with TEFRA relat
liabilities are barred from seeking §6404(h) pre-payme
review in the Tax Court unless they were the prevaili
parties in the TEFRA partnership-level case. But Congr
expressly included the prevailing party limitation unc
§6404(h) and only Congress can remove it.

b. Preclusive Effect

The United States errs when it asserts that after th
claims are denied taxpayers similarly situated to t
AMCOR partners could have filed two suits – one in the T
Court to address their §6404(e)(1) claim, and another in t
Claims Court or district court, as applicable, to addr
their other grounds – and the first to be resolved wo
have no preclusive effect on the other because, under t
Federal Circuit's holding, the Claims Court and the distr
courts cannot review §6404(e)(1) claims.

First, the Tax Court has no §6404(e)(1) refu
jurisdiction. Section 6404(h)(1) authorizes the Tax Court
"order an abatement," it does not authorize the Tax Co
to order a refund. Under §6404(h)(2)(B), §6404(h) is subj
to "rules" similar to the rules for the Tax Court's refu
jurisdiction under §6512(b). But requiring similar rules d
not clearly grant the Tax Court refund jurisdiction.

Second, there is no *general* refund jurisdiction in t
Tax Court similar to §1346(a)(1), 1491(a)(1), and 7422
refund jurisdiction of the Claims Court and district cour
In a deficiency proceeding the Tax Court acqui
supplemental refund jurisdiction and its decision is
judicata for that tax year, even as to refund suits fi
before the Tax Court case. *Russell v. U.S.*, 592 F.2d 1(
(9th Cir. 1979); *Prizer v. U.S.*, 11 Cl.Ct. 184,186-87 (198

If §6404(h) grants the Tax Court exclusive jurisdicti
over *all* §6404 claims, then it might be true that

resolution in the Claims Court or district court of other issues would not be *res judicata* as to a pending Tax Court §6404 case for that tax year. But if the Tax Court's §6404 refund jurisdiction encompasses supplemental general refund jurisdiction in the same manner as §6512(b), then once attached, it would extend to the entire subject of the correct tax for that year and the Tax Court's §6404 determination would be *res judicata* as to the taxpayer's entire liability for that year.

a. Judicial Expertise

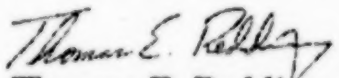
The Claims Court and the district courts also routinely review for abuses of discretion the regulatory and administrative schemes of federal agencies for errors, delays, and improper refusals to act. No expertise in substantive tax liability is required to spot errors, delays, and improper denials of abatements. A case would be subject to review by the same court of appeals whether brought in the Tax Court or a district court. *Golsen v. C.I.R.*, 54 T.C. 742 (1970). Claims Court cases are appealed to the Federal Circuit which was specifically established to review cases related to federal agencies and routinely reviews tax cases.

CONCLUSION

Congress enacted §6404(h) specifically to address the IRS's repeated bad faith refusals to make §6404 abatements and correct the frustrated judicial review of §6404(e)(1) claims. It gave the Tax Court pre-payment jurisdiction over all §6404 abatement denials. It did not intend in the TBOR2 to narrow or repeal the existing *Flora* scheme of concurrent pre-payment jurisdiction in the Tax Court and post-payment refund jurisdiction in the Claims Court and district courts.

The Fifth Circuit's analysis in *Beall* should be adopt and the judgment of the Court of Appeals for the Fede Circuit should be reversed.

Respectfully Submitted,



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In the Supreme Court of the United States

JOHN F. HINCK AND PAMELA F. HINCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, pursuant to 26 U.S.C. 6404(h) (Supp. IV 2004), the Tax Court has exclusive jurisdiction to review determinations of the Internal Revenue Service not to grant a taxpayer's request for interest abatement under 26 U.S.C. 6404(e)(1).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument:
Section 6404(h) of the Tax Code provides the exclusive judicial remedy for adverse interest abatement determinations 12
A. The availability of a precisely drawn, specific remedy precludes resort to a general remedy 12
B. Section 6404(h) establishes a limited remedy in the Tax Court for adverse interest abatement determinations 16
1. Section 6404(h) imposes limits on who may sue and when 16
2. Congress enacted Section 6404(h) against a backdrop of decisions uniformly precluding judicial relief for Section 6404(e)(1) claims 21
C. When Congress establishes a specific review procedure, that procedure is generally regarded as exclusive 24
D. The Fifth Circuit's decision in *Beall* is incorrect 26
1. The canon of implied repeal does not assist petitioners 28
2. Exclusive Tax Court jurisdiction is consistent with the general structure of the Tax Code 31

Table of Contents—Continued: Page

3. Exclusive review in the Tax Court does not create any anomalies, let alone anomalies that would justify departing from Section 6404(h)'s text 34
E. This Court presumes that an agency will act in good faith 40
Conclusion 41
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 13
Argabright v. *United States*, 35 F.3d 472 (9th Cir. 1994) 2, 22, 29
Bax v. *Commissioner*, 13 F.3d 54 (2d Cir. 1993) 22
Beall v. *United States*:
336 F.3d 419 (5th Cir. 2003) 8, 26
335 F. Supp. 2d 743 (E.D. Tex. 2004), aff'd on other grounds, 467 F.3d 864 (5th Cir. 2006) 19
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 18, 31
Block v. *North Dakota*, 461 U.S. 273 (1983) ..... *passim*
Brahms v. *United States*, 18 Cl. Ct. 471 (1989) 22
BP Am. Prod. Co. v. *Burton*, 127 S. Ct. 638 (2006) 29
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 35
Brown v. *GSA*, 425 U.S. 820 (1976) 12, 13, 21, 22, 30
Bourekis v. *Commissioner*, 110 T.C. 20 (1998) 41

Cases—Continued: Page

City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005) 11, 14, 16, 21, 30
De Sabichi v. *Commissioner*, 4 B.T.A. 445 (1926) 31
Donovan v. *Commissioner*, 80 T.C.M. (CCH) 78 (July 21, 2000) 19
Drummond Coal Co. v. *Watt*, 735 F.2d 469 (11th Cir. 1984) 25
Estate of Andrews v. *United States*, 850 F. Supp. 1279 (E.D. Va. 1994) 22
Estate of Kunze v. *Commissioner*, 233 F.3d 948 (7th Cir. 2000) 20, 36
Fisher v. *Commissioner*, 80 T.C.M. (CCH) 338 (Sept. 5, 2000) 38
508 Clinton St. Corp. v. *Commissioner*, 89 T.C. 352 (1987) 39
Flora v. *United States*, 362 U.S. 145 (1960) 15
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 26
Fry v. *United States*, 72 Fed. Cl. 500 (2006) 32
Gardner v. *Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) 25
Great Am. Fed. Sav. & Loan Ass'n v. *Novotny*, 442 U.S. 366 (1979) 11, 14, 29, 30
Greater Detroit Res. Recovery Auth. v. *EPA*, 916 F.2d 317 (6th Cir. 1990) 25
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 26
Horton Homes, Inc. v. *United States*, 936 F.2d 548 (11th Cir. 1991) 2, 22, 29
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 35

Cases—Continued: Page

Marino v. *Brown*, 357 F.3d 143 (1st Cir. 2004) 33
NEA v. *Finley*, 524 U.S. 569 (1998) 35
Redeker-Barry v. *United States*, 476 F.3d 1189 (11th Cir. 2007) 33
Richard v. *Hinson*, 70 F.3d 415 (5th Cir. 1995), cert. denied, 518 U.S. 1004 (1996) 36
Richter v. *Commissioner*, 16 B.T.A. 936 (1929) 31
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 36
Selman v. *United States*, 941 F.2d 1060 (10th Cir. 1991) 2, 22, 26, 29
Smith v. *Robinson*, 468 U.S. 992 (1984) 15
USPS v. *Gregory*, 534 U.S. 1 (2001) 40
Telecommunications Research & Action Ctr. v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984) 25
USPS v. *Gregory*, 534 U.S. 1 (2001) 40
United States v. *Dalm*, 494 U.S. 596 (1990) 5
United States v. *Estate of Romani*, 523 U.S. 517 (1998) 10, 15, 28, 29, 30
United States v. *Fausto*, 484 U.S. 439 (1988) 18, 20, 28
United States v. *Mottaz*, 476 U.S. 834 (1986) 14
Voelker v. *Nolen*, 365 F.3d 580 (7th Cir. 2004) 33
Warth v. *Seldin*, 422 U.S. 490 (1975) 35
Whitney Nat'l Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 8, 24, 26
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 35

Constitution, statutes and regulation: Page

U.S. Const.:
Art. II, § 2, Cl. 2 (Appointments Clause) 26
Amend. V (Due Process Clause) 36
Act of Jan. 23, 2002, Pub. L. No. 107-134, § 112(d)(1), 114 Stat. 2434-2435 3
Administrative Procedure Act, 5 U.S.C. 703 25
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 30
§ 717, 42 U.S.C. 2000e-16 (Supp. IV 1974) 13, 21, 30
Equal Access to Justice Act:
28 U.S.C. 2412(d)(1)(B) (Supp. IV 1986) 36, 37, 14a
28 U.S.C. 2412(d)(2)(B) 3, 19
28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986) 36, 15a
General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* 14
Internal Revenue Code (26 U.S.C.):
§ 6015(e) 33, 34, 1a
§ 6015(e)(1)(A) 33, 1a
§ 6015(e)(3) 33, 34, 3a
§ 6213(a) 2, 31, 39, 3a
§ 6213(b)(4) 31
§ 6215(a) 39
§ 6330 33
§ 6330(d) 32, 33, 34, 4a
§ 6330(d)(1) 32, 4a
§ 6330(d)(1)-(Supp. IV 1998) 32, 33

Statutes and regulation—Continued: Page

§ 6404 2
§ 6404(e)(1) ..... *passim*
§ 6404(e)(1)(A) (1994) 5a
§ 6404(g) 3
§ 6404(h) (Supp. IV 2004) ..... *passim*, 7a
§ 6404(h)(1) (Supp. IV 2004) 19, 36, 40
§ 6404(h)(2)(B) (Supp. IV 2004) 4
§ 6404(h)(2)(C) (Supp. IV 2004) 4
§ 6404(i) 3
§ 6511 20
§ 6511(a) 5
§ 6512(b) 4, 31, 8a
§ 6532(a)(1) 5, 16, 11a
§ 6532(a)(2) 5, 12a
§ 6601(a) 5, 19
§ 6621(c) 34
§ 6621(c)(4) (1988) 34
§ 7422 ..... 31, 12a
§ 7422(a) 4, 5
§ 7430 ..... 3, 9
§ 7430(c)(4)(A)(ii) 3, 19, 37, 13a
§ 7481(d) 34
Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685:
§ 3305, 112 Stat. 743 3
§ 3309, 112 Stat. 745 3
Quiet Title Act of 1972, 28 U.S.C. 2409a 21

Statutes and regulation—Continued: Page

28 U.S.C. 2409a(a) 14
Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 1019 (§ 6330(d)(1)) 33, 5a
Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762 (26 U.S.C. 6404(e)(1)) 2
Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452:
§ 301(a), 110 Stat. 1457 4
§ 301(c), 110 Stat. 1457 4
§ 302(a), 110 Stat. 1457 (§ 6404(g)) 3
§ 302(b), 110 Stat. 1458 4
Tucker Act:
28 U.S.C. 41(20) (1940) 17
28 U.S.C. 1491(a) 6
28 U.S.C. 1491(a)(1) 4, 5
28 U.S.C. 1346(a)(1) 4, 6, 31, 13a
28 U.S.C. 1491(a)(1) 31, 14a
42 U.S.C. 1983 ..... 30, 31
42 U.S.C. 1985(3) 14, 30, 31
47 U.S.C. 332(c)(7) 30
26 C.F.R.:
Section 301.6404-2 ..... 14, 19
Section 301.6404.2(a)(2) 19

Miscellaneous:

H.R. Rep. No. 426, 99th Cong., 1st Sess. (1985) 2
H.R. Rep. No. 506, 104th Cong., 2d Sess. (1996) .. *passim*

Miscellaneous—Continued: Page

6 Internal Revenue Manual: Admin. (CCH) § 20.2.7, at 46,093 (Aug. 1, 2006) 4

Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional*, 5 Fla. Tax Rev. 357 (2001) 39

Restatement (Second) of Judgments (1982) 40

Rev. Proc. 2005-18, 2005-1 C.B. 798 19

Rev. Proc. 84-58, 1984-2 C.B. 501:

§ 5, 1984-2 C.B. at 503 19

In the Supreme Court of the United States

No. 06-376

JOHN F. HINCK AND PAMELA F. HINCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 446 F.3d 1307. The opinion of the Court of Federal Claims (Pet. Supp. App. 76-106) is reported at 64 Fed. Cl. 71.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. The petition for a writ of certiorari was filed on July 28, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. a. If a person liable to pay any tax fails to pay the tax when due, interest accrues on the unpaid amount from the time the tax is due until the time it is paid. 26 U.S.C. 6601(a). The Secretary of the Treasury is authorized to abate a tax or liability assessment in certain circumstances. 26 U.S.C. 6404. In 1986, Congress amended Section 6404 by adding subsection (e)(1), which for the first time authorized the Secretary to grant an abatement of interest attributable to "any error or delay" in the performance of a "ministerial act" by the Internal Revenue Service (IRS). Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762. When taxpayers sought judicial review of the Secretary's decision not to grant such an abatement under subsection (e)(1), the federal courts did not permit such cases to proceed because that subsection, in contrast to other provisions that required the Secretary to abate interest, merely provided that "the Secretary may abate" interest and established no tests or standards by which to adjudicate the correctness of the determination, thus consigning the decision whether to abate interest to the Secretary's sole discretion. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); see also H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985) ("The bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds * * *.)").

b. In 1996, Congress amended Section 6404 to add present subsection (h).[1] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 302(a), 110 Stat. 1457. That subsection provides certain taxpayers with the right to obtain Tax Court review of the Secretary's determination not to abate interest, but only if they seek such review within 180 days:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this subsection was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

26 U.S.C. 6404(h)(1) (Supp. IV 2004). The reference to 26 U.S.C. 7430 generally restricts the availability of review to individual taxpayers whose net worth does not exceed $2 million and to businesses whose net worth does not exceed $7 million. See 26 U.S.C. 7430(c)(4)(A)(ii); 28 U.S.C. 2412(d)(2)(B); H.R. Rep. No. 506, 104th Cong., 2d Sess. 28 (1996) (H.R. Rep. No. 506) ("An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees."). Section 6404(h) also provides that, if the

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[1] Section 6404(h) was initially designated Section 6404(g), by Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 302(a), 110 Stat. 1457, was redesignated Section 6404(i) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3305, 3309, 112 Stat. 743, 745, and was redesignated Section 6404(h) in 2002. See Act of Jan. 23, 2002, Pub. L. No. 107-134, § 112(d)(1), 115 Stat. 2435.

Tax Court determines that the IRS abused its discretion in declining to abate interest, that court may order a refund of some or all of the interest. 26 U.S.C. 6404(h)(2)(B) (Supp. IV 2004), 6512(b). It further provides that an order of the Tax Court under Section 6404(h) is reviewable by the courts of appeals, but "only with respect to the matters determined in such order." 26 U.S.C. 6404(h)(2)(C) (Supp. IV 2004).

At the same time that Congress added subsection (h), it amended subsection (e)(1) by adding the word "unreasonable" before the words "error or delay," and by changing the words "ministerial act" to "ministerial or managerial act." Taxpayer Bill of Rights 2, § 301(a), 110 Stat. 1457. Congress gave different effective dates to the two amendments. As a result, the present case is subject to subsection (h), but is governed by the original version of subsection 6404(e)(1).[2]

c. The Tucker Act, 28 U.S.C. 1491(a)(1), grants the United States Court of Federal Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department," including tax refund actions authorized by 26 U.S.C. 7422(a). *Ibid.* Similarly, 28 U.S.C. 1346(a)(1) grants federal district

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[2] The amendments to subsection (e)(1) are effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996. Taxpayer Bill of Rights 2, § 301(c), 110 Stat. 1457. Subsection (h), however, is effective for all requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved. § 302(b), 110 Stat. 1458. The IRS adopted final regulations on December 18, 1998, relating to interest abatement under Section 6404(e)(1). See 26 C.F.R. § 301.6404-2. The IRS also established procedures for the processing of taxpayer requests for interest abatement. See 6 Internal Revenue Manual: Admin. (CCH) § 20.2.7, at 46,093 (Aug. 1, 2006).

courts jurisdiction, concurrent with that of the Court of Federal Claims, over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." *Ibid.* Such tax refund actions cannot be brought, in any court, "until a claim for refund or credit has been duly filed" with the IRS. 26 U.S.C. 7422(a); *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). An administrative refund claim must be filed within two years from the date a tax is paid or three years from the time the return was filed, whichever is later. 26 U.S.C. 6511(a). Any tax refund action must be filed within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2).

2. Petitioners filed a joint federal income tax return for 1986. Pet. App. 4. A decade later, while their 1986 tax year was under examination, petitioners made an advance remittance to the IRS. *Ibid.* Four years later, the IRS made an agreed adjustment to petitioners' 1986 liability, assessed the resulting tax and interest, and refunded to petitioners the balance of their advance remittance. *Ibid.*; Pet. Supp. App. 78-79. Petitioners subsequently filed an administrative claim for refund, which included a request that the IRS abate interest under Section 6404(e)(1). Pet. App. 4; Pet. Supp. App. 80. Two years after the IRS denied that refund request, petitioners filed suit in the Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Pet. App. 4.

3. The Court of Federal Claims dismissed petitioners' suit for lack of jurisdiction. Pet. Supp. App. 76-106. The court explained that its jurisdiction in tax refund suits derives solely from the Tucker Act, 28 U.S.C. 1491(a), and not from 28 U.S.C. 1346(a)(1), which grants the federal district courts concurrent jurisdiction over tax refund suits. Pet. Supp. App. 87. Tax refund suits, the court reasoned, represent a category of cases arising under the Tucker Act that involve the illegal exaction of money. *Id.* at 85. If the decision whether to abate interest is consigned to agency discretion, the court explained, the IRS's refusal to abate interest cannot be "illegal." *Id.* at 89. The court observed that, prior to its amendment in 1996, the permissive language of Section 6404(e)(1)—*i.e.*, the use of the word "may" and the absence of any standard by which the IRS's decision might be judged—had consigned the determination whether to abate interest to the IRS's sole discretion, with the result that the IRS's determination not to abate interest under that subsection was not reviewable by the courts. *Id.* at 89-93. The court thus concluded that, before Congress granted the Tax Court review authority by enacting Section 6404(h), petitioners' claim could never have "give[n] rise to an 'illegal' exaction" and jurisdiction would have been "lacking." *Id.* at 94.

The court held that the enactment of Section 6404(h) did not change the result. The court explained that it was still "confronted with the same 'may abate' language" and that "the version of section 6404(e)(1) applicable here—in which the word 'unreasonable' is not yet included —* * * still does not give the slightest clue as to how a court might distinguish between permissible and impermissible exercises of the Secretary's discretion." Pet. Supp. App. 95 (footnote omitted). And while

"Congress undeniably has expressed the intention that some court have jurisdiction to review abatement decisions," the court observed that Congress chose the Tax Court, "not this court." *Id.* at 96. "[H]ad Congress intended to work such a fundamental change in jurisdiction or justiciability" by authorizing challenges in the Court of Federal Claims and federal district courts to the IRS's refusal to abate interest, the court reasoned, "[Congress] would have done so expressly—as it did in the case of the Tax Court—and not, as [petitioners] assert[], through a tortured web of inferences and exported standards." *Id.* at 98-99.

4. The court of appeals affirmed, but on a different ground. Pet. App. 1-17. It held that Section 6404(h) granted the Tax Court exclusive jurisdiction to review the IRS's determination not to abate interest under Section 6404(e)(1).[3] Pet. App. 11. The Federal Circuit stated that "[w]hen interpreting a statute, we look first to the language of the statute." *Ibid.* The court noted that Section 6404(h) expressly grants jurisdiction only to the Tax Court. *Ibid.* The court further observed that the statute specifies a particular procedure to be used by the Tax Court and grants it the power to issue a remedy—an order of abatement—if an action is brought within 180 days after the mailing of the final determination not to abate interest. *Id.* at 11-12. The court also noted that Section 6404(h) expressly provides a specific standard of review—abuse of discretion—to be em-

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[3] The Federal Circuit thus found it unnecessary to address either the justiciability question resolved by the Court of Federal Claims or the source of that court's jurisdiction in tax refund suits. Because the government is defending the judgment below solely on the ground on which the court of appeals relied, this Court need not address those issues.

ployed by the Tax Court in reviewing determinations regarding interest abatement. *Ibid.* Applying the plain language of the statute, the court concluded that "[b]ecause § 6404(h) provides a specific procedure for reviewing IRS determinations of interest abatement, specifies that the proper forum for those reviews is the Tax Court, and grants the Tax Court the power to issue an abatement, we conclude that Congress intended the Tax Court to be the sole forum in which denials of interest abatement claims may be challenged." *Id.* at 12.

The Federal Circuit also found it significant that the Tax Court "is a specialized court with expertise in tax matters." Pet. App. 13. It emphasized that where "statutory review procedures [are] designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." *Id.* at 12 (quoting *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

The Federal Circuit observed that the legislative history of Section 6404(h) confirms that the Tax Court has exclusive jurisdiction over interest-abatement claims. Pet. App. 13-14. The court noted that, although Congress "recognized that the courts generally d[id] not have jurisdiction over interest abatement claims," *id.* at 14 (citing H.R. Rep. No. 506, at 28), Congress's response was not to grant jurisdiction to the district courts and the Court of Federal Claims but, instead, to vest jurisdiction only in the Tax Court. *Id.* at 13-14.

The Federal Circuit acknowledged (Pet. App. 16) that its decision was in conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003). It stated, however, that the purported anomalies identified by the Fifth Circuit—that some taxpayers' interest-abatement claims would not be reviewable in any forum

and that other taxpayers would have to split their claims —did not persuade it to construe the statute differently. Pet. App. 16-17. The legislative history clearly established that Congress intended that, under Section 6404(h), taxpayers who exceeded the net-worth requirements for seeking attorney's fees under 26 U.S.C. 7430 could not seek review of the IRS's interest abatement determination. Pet. App. 16. The Federal Circuit further explained that Congress was well aware that district courts had jurisdiction over refund claims but nonetheless specifically granted only the Tax Court jurisdiction to review interest abatement requests. Thus, the fact that some claims might be split did not compel the court to ignore the clear statutory language. *Id.* at 16-17.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Tax Court has exclusive jurisdiction to review a taxpayer's action challenging the IRS's refusal to abate interest under 26 U.S.C. 6404(e)(1). The text, structure, and history of Section 6404(h) reveal that Congress intended to establish a limited remedy for adverse interest abatement determinations in the Tax Court only.

When Congress establishes a specific remedy for violation of a statutory right, the settled rule is that Congress ordinarily intends that remedy to be exclusive. That rule is fully applicable to Section 6404(h). In establishing a remedy in the Tax Court for adverse interest abatement determinations, Congress imposed specific limits on who may bring suit and when it may be brought. Under petitioners' approach, those restrictions could be evaded by the simple expedient of bringing the action in a different forum, a result that contravenes not

only Section 6404(h)'s language and structure but also principles of sovereign immunity.

Section 6404(h)'s history further demonstrates that Congress intended the remedy it provided to be the exclusive means of obtaining judicial relief. Congress was well aware that taxpayers had been unable to pursue actions seeking interest abatement under Section 6404(e)(1) in any court. Congress responded to taxpayers' inability to obtain judicial review by establishing a limited remedy in the Tax Court. Had Congress wanted to change the prevailing rule that the district courts could not adjudicate Section 6404(e)(1) claims, it could have done so in a direct and straightforward way. Nothing in the grant to the Tax Court of authority to review the IRS's interest abatement determinations for abuse of discretion implies, much less clearly indicates, that Congress intended to subject those decisions to review in the district courts and the Court of Federal Claims as well.

Petitioners' reliance on the implied-repeal canon is misplaced. At the time Congress enacted Section 6404(h), no taxpayer had been permitted by any court to obtain judicial review of an adverse interest abatement determination. Instead, the courts had held that Congress had committed interest abatement determinations under Section 6404(e)(1) solely to agency discretion. Regardless of whether those courts were correct in so holding, Congress had no reason to believe that it was repealing any preexisting taxpayer right when it provided a remedy in the Tax Court. The Court has made clear that it will not apply the implied-repeal canon in those circumstances. See *United States* v. *Estate of Romani*, 523 U.S. 517 (1998). Instead, the rule that a specific remedy forecloses resort to a general remedy is

controlling here, particularly because the tax refund mechanism that petitioners seek to invoke "creates no rights but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" *City of Ranchos Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 n.2 (2005) (quoting *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1979)).

Contrary to petitioners' contentions and the Fifth Circuit's decision in *Beall*, construing Section 6404(h) to provide the exclusive remedy for adverse interest abatement determinations does not create "anomalies." Pet. App. 37. There is nothing anomalous in Congress's decision to limit the class of taxpayers who can obtain judicial review of an administrative determination for which no review was previously available. Congress has established net-worth limitations on other forms of judicial relief, and taxpayers whose net worth exceeds the limits established under the law ($2 million for individuals and $7 million for businesses) may fully protect their interests by paying their taxes up front so as to avoid the accrual of interest. Nor is there anything anomalous about requiring a taxpayer bringing a refund claim in the district court or the Court of Federal Claims to file a separate interest abatement action in the Tax Court. The vast majority of taxpayers litigate their tax disputes in the Tax Court, and those taxpayers must split their claims in any event, since an interest abatement claim does not ripen until after the Tax Court has determined that a deficiency exists. The interest abatement claim is also distinct and freestanding in nature, requiring an evaluation—under a deferential standard of review—of the internal administrative processing of a taxpayer's case. It thus makes sense to channel the initial review of such claims to a single court that can develop exper-

tise in reviewing this aspect of the tax administration process.

Finally, petitioners argue that if Section 6404(h) provides the exclusive remedy for adverse interest abatement determinations, the IRS could frustrate judicial review by simply failing to process the taxpayer's administrative claim for abatement. This Court will not presume that an agency will exercise its authority in bad faith, however, and there is no evidence that the IRS has done so.

ARGUMENT

SECTION 6404(h) OF THE TAX CODE PROVIDES THE EXCLUSIVE JUDICIAL REMEDY FOR ADVERSE INTEREST ABATEMENT DETERMINATIONS

The court of appeals correctly held that the Court of Federal Claims lacked jurisdiction over petitioners' action. Section 6404(h) of the Tax Code specifies that certain taxpayers may file an action in the Tax Court challenging the IRS's determination not to abate interest. It is well settled that when Congress creates a specific remedy for violation of a statutory right, that remedy is generally deemed to be exclusive. Petitioners cannot identify any sufficient basis for departing from that settled rule, and therefore cannot circumvent the limitations incorporated into Section 6404(h)'s remedial scheme by pursuing a tax refund suit, either in the Court of Federal Claims or in district court.

A. The Availability Of A Precisely Drawn, Specific Remedy Precludes Resort To A General Remedy

This Court has explained "[i]n a variety of contexts" that "a precisely drawn, detailed statute preempts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834-835

(1976) (citing cases); see *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). In particular, the Court has found that rule to be controlling when the "balance, completeness, and structural integrity" of the specific remedy suggests that it was not merely a supplement to a more general remedy but was intended by Congress to be the exclusive avenue of relief. *Brown*, 425 U.S. at 832; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

For example, in *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Supp. IV 1974), is the "exclusive judicial remedy" available to a federal employee claiming to have been the victim of racial discrimination in the workplace. 425 U.S. at 835. The Court in *Brown* concluded that, when Congress enacted Section 717, Congress was "persuaded that federal employees who were treated discriminatorily had no effective judicial remedy." 425 U.S. at 828. The Court also relied upon Section 717's "rigorous administrative exhaustion requirements and time limitations," observing that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833. Because the federal employee's complaint was untimely under Section 717, the Court held that it was correctly dismissed, despite the employee's assertion of jurisdiction under other federal statutes. *Id.* at 823-824, 835.

The Court has applied the rule that Congress's enactment of a specific remedy precludes resort to general remedies to other remedial schemes as well. In *Block* v. *North Dakota*, the Court found *Brown* "instructive" in

concluding that "Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," thereby precluding challenges to the government's title to land under other theories of jurisdiction. 461 U.S. at 286. And in *United States* v. *Mottaz*, 476 U.S. 834 (1986), the Court held that the Quiet Title Act precluded an action brought under the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, because the Quiet Title Act provided the exclusive means to challenge the United States' title to real property. 476 U.S. at 841-848.[4]

Similarly, in *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 378 (1979), the Court relied on *Brown* in foreclosing relief under 42 U.S.C. 1985(3) for an alleged conspiracy to deprive the respondent of equal protection of the law, concluding that "the right[s] created by Title VII" could be asserted only within the remedial scheme that Title VII itself established. More recently, this Court held that the Telecommunications Act of 1996 provides the exclusive remedy for a violation of its provisions and thus forecloses an action brought under 42 U.S.C. 1983. *City of Ranchos Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005) ("The provision of an express, private means of redress in the statute itself is ordinarily an indication

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[4] The Court in *Mottaz* also held that the Quiet Title Act did not preclude actions under the Tucker Act seeking compensation for the government's taking of property, because the Quiet Title Act contained a savings clause providing that the Quiet Title Act does not "apply to or affect actions which may be or could have been brought under sections 1346 . . . [or] 1491 . . . of this title." 476 U.S. at 850 (footnote omitted) (quoting 28 U.S.C. 2409a(a)). No such savings clause appears in Section 6404(h).

that Congress did not intend to leave open a more expansive remedy under [another provision].").

The "rule that a precisely drawn, detailed statute preempts more general ~~remedies~~," *North Dakota*, 461 U.S. at 285, is fully applicable to challenges to the government's tax enforcement decisions. Indeed, given the "carefully articulated and quite complicated structure of tax laws," allowing circumvention of a specific remedy risks "destroying the existing harmony of the tax statutes." *Flora* v. *United States*, 362 U.S. 145, 157-158 (1960). See *United States* v. *Estate of Romani*, 523 U.S. 517, 532 (1998) (resolving inconsistency between general federal priority statute and the Federal Tax Lien Act of 1966 by giving effect to the 1966 Act because it "is the later statute [and] the more specific statute" which "represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to many different sorts of interests"); *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941) (requiring dismissal of tax refund action brought under the Tucker Act because the action was untimely under the statute of limitations specific to tax refund actions). As explained below, it would be inconsistent with Section 6404(h)'s limited remedial scheme to permit all taxpayers to bring interest-abatement claims as tax refund actions in the district courts or in the Court of Federal Claims. Taxpayers who brought such tax refund actions would be able to avoid the specific requirements of Section 6404(h), and thereby "render superfluous most of the detailed procedural protections outlined in the statute." *Smith* v. *Robinson*, 468 U.S. 992, 1011 (1984).

B. Section 6404(h) Establishes A Limited Remedy In The Tax Court For Adverse Interest Abatement Determinations

1. Section 6404(h) imposes limits on who may sue and when

a. The limitations that Section 6404(h) imposes on a taxpayer's ability to obtain relief from an adverse Section 6404(e)(1) determination support application of the settled rule that a specific remedy precludes resort to a general one. Under Section 6404(h), a taxpayer has only 180 days after the IRS's denial of a request for abatement to file a claim. By contrast, the statute of limitations for refund suits is two years from the time of denial (26 U.S.C. 6532(a)(1)). As this Court has explained, Congress's creation of a shorter statute of limitations for a specific remedial scheme strongly suggests that Congress intended the remedy to be exclusive of other potentially available remedies with longer limitations periods. See *North Dakota*, 461 U.S. at 285; accord *Abrams*, 544 U.S. at 122-125. That is particularly true when the remedy is against the United States. In that context, the shorter limitation period limits the waiver of the United States' sovereign immunity with respect to the type of action covered by the specific remedy, and it indicates a congressional intent that such actions must be brought expeditiously. See *North Dakota*, 461 U.S. at 283-285. If claimants nevertheless could pursue the general remedy, the shorter statute of limitations "could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted." *Id.* at 285.

Thus, in *A.S. Kreider Co.*, this Court rejected a taxpayer's attempt to avoid the then-applicable statute of

limitations specific to tax refund actions. See 313 U.S. at 446. Having failed to file a timely tax refund action in compliance with that provision, the taxpayer sought to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940). The Court rejected that attempt, reasoning that the shorter and more specific limitation period for tax refund actions would have "no meaning" if the general Tucker Act limitation period governed such actions. 313 U.S. at 448. Noting that the six-year limitation was phrased in the negative (*i.e.*, providing that "[n]o suit * * * shall be allowed" unless brought within six years of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447. In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.* The same reasoning is equally applicable in this case, and forecloses petitioners' attempt to avoid the effect of the six-month limitation period in Section 6404(h)(1).

b. Section 6404(h) also limits the class of taxpayers who are eligible to challenge adverse interest abatement determinations; only those taxpayers whose net worth does not exceed specified amounts are entitled to seek such relief. No such limitation, however, applies to tax-refund suits. The Court has observed that "when a statute provides a detailed mechanism for judicial consider-

ation of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). Thus, the Court held that consumer suits challenging milk market orders were precluded where the statute specified a particular mechanism for administrative and judicial proceedings initiated by producers and distributors, but was silent as to consumers. *Id.* at 348 (explaining that such consumer suits would "effectively nullify Congress' intent to establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms") (internal quotation marks omitted).

Similarly, in *United States* v. *Fausto*, 484 U.S. 439 (1988), the Court held that the Civil Service Reform Act of 1978 (CSRA) precluded judicial resolution of the merits of a back-pay action brought under the Tucker Act by an individual for whose adverse employment action the CSRA provided no administrative or judicial review. The Court explained that "[t]he question we face is whether [the CSRA's] withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA." *Id.* at 443-444. Reviewing the statutory language and the "structure of the statutory scheme," *id.* at 449, the Court concluded that "[the CSRA's] deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review * * * prevents respondent from seeking review in the Claims Court under the Back Pay Act," *id.* at 455.

Similarly here, the statutory limitation on the class of individuals eligible to seek judicial review supports the conclusion that the Tax Court remedy is exclusive. The net-worth test of Section 6404(h)(1) (by way of 26 U.S.C. 7430(c)(4)(A)(ii) and 28 U.S.C. 2412(d)(2)(B)) is directly related to the role that interest plays in the administration of the internal-revenue laws as a whole. When a taxpayer is first notified by the IRS that additional taxes are owed, the taxpayer has the option of immediately paying the tax and then contesting the liability in a refund suit, or instead contesting the liability before payment in the Tax Court. If the taxpayer chooses the first option, further interest does not accrue. See 26 U.S.C. 6601(a); see also Rev. Proc. 2005-18, 2005-1 C.B. 798, 798-799; Rev. Proc. 84-58, § 5, 1984-2 C.B 501, 503. Thus, taxpayers who can and do pay the additional tax liability asserted by the IRS before contesting that liability never risk being liable for the interest that would otherwise accrue, and they have no need for a mechanism for seeking (and challenging the denial of) interest abatement. It is only those taxpayers who are unable to pay the additional tax liability asserted by the IRS, or who choose not to do so, for whom judicial review of interest abatement determinations is potentially relevant.[5]

Limiting judicial review of the Secretary's interest abatement decisions to those taxpayers whose net worth

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[5] The Secretary lacks authority, under Section 6404(e)(1), to abate interest attributable to errors and delays occurring before the IRS first contacts the taxpayer in writing regarding the deficiency. 26 U.S.C. 6404(e)(1); 26 C.F.R. 301.6404-2(a)(2); *Beall* v. *United States*, 335 F.Supp.2d 743, 751 (E.D. Tex. 2004), aff'd on other grounds, 467 F.3d 864, 867-868 (5th Cir. 2006); *Donovan* v. *Commissioner*, 80 T.C.M. (CCH) 78, 80 (July 21, 2000).

does not exceed specified amounts thus reflects the fact that taxpayers with ample resources may protect themselves against interest costs simply by paying the contested amount when they are first notified by the IRS. The statute reflects Congress's common sense judgment that such taxpayers do not require judicial review as a protection against the possibility that the Secretary might abuse the discretion conferred by Section 6404(e)(1). Cf. *Fausto*, 484 U.S. at 448-449 ("[T]he absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action.").

Moreover, interest under the Internal Revenue Code is not intended as a penalty, but is merely a charge for the time-value of money. Even if the amount of interest owed under Section 6511 increases because of errors or delays by IRS employees in performing ministerial acts, the taxpayer still had the use of the money during that time. A taxpayer who was able to invest the money would presumably have earned a financial return sufficient to offset some or all of the interest accruing on his unpaid tax debt. The net-worth test of Section 6404(h) thus reflects the fact that small taxpayers may benefit from the protection of judicial review, whereas large taxpayers can typically protect themselves against administrative errors and delays simply by paying the tax asserted to be due or by investing their money elsewhere. See *Estate of Kunze* v. *Commissioner*, 233 F.3d 948, 955 (7th Cir. 2000) (noting that to a large taxpayer, the cost of posting a bond or paying in advance is merely "the opportunity cost of lost interest income"). Accord-

ingly, the features of Section 6404(h) support the conclusion that Congress intended to limit judicial review of interest abatement determinations to those taxpayers who were less likely to be in a position to protect themselves against increased interest liability by prepaying the contested amount, and who file their claims within 180 days of the denial of a request for abatement. See *Abrams*, 544 U.S. at 124 (This Court's cases "adopt the * * * assumption * * * that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through [another statute].").

2. Congress enacted Section 6404(h) against a backdrop of decisions uniformly precluding judicial relief for Section 6404(e)(1) claims

Congress's understanding, at the time it enacted Section 6404(h), that claimants "had no effective judicial remedy," *Brown*, 425 U.S. at 828, also supports application of the settled rule that a specific remedy forecloses judicial relief by other means. Under this Court's precedents, if Congress believed that it was providing a remedy where none previously existed, or where any potential remedies were "problematic," the inference to be drawn is that the specific remedy is exclusive. *North Dakota*, 461 U.S. at 285; see *Brown*, 425 U.S. at 826-829.

Applying those principles, the Court in *Brown* relied in part on the observation that Congress was "persuaded that federal employees who were treated discriminatorily had no effective judicial remedy" when Congress enacted Section 717, which the Court construed to provide the "exclusive judicial remedy" for such discrimination. 425 U.S. at 828. Similarly, in *North Dakota* the Court held that Congress intended the Quiet Title Act of 1972, 28 U.S.C. 2409a, "to provide the exclusive means

by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. In so doing, the Court rejected the availability of a so-called "officer's suit" against the federal officials who oversaw the disputed land. *Id.* at 284-285. The Court placed great weight on the fact that Congress included a twelve-year statute of limitations and other restrictions on its waiver of the United States' sovereign immunity in the Quiet Title Act, restrictions that would be "rendered nugatory" if an officer's suit were an available alternative remedy. *Id.* at 285. The Court also pointed to Congress's understanding that officers' suits were not an available remedy, *id.* at 282, or at least that "it was 'problematic' whether any judicial relief at all was available" before passage of the Quiet Title Act, *id.* at 285 (quoting *Brown*, 425 U.S. at 826).

Section 6404(h) was enacted in 1996 against the background understanding that, when the Secretary declined to abate interest, no judicial review was available. Every court of appeals to consider the matter had refused to permit a taxpayer to obtain judicial review of an adverse interest abatement determination, as had several district courts and the Claims Court. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); *Estate of Andrews* v. *United States*, 850 F. Supp. 1279 (E.D. Va. 1994); *Brahms* v. *United States*, 18 Cl. Ct. 471 (1989). See also *Bax* v. *Commissioner*, 13 F.3d 54, 58 (2d Cir. 1993) ("[W]e note substantial authority for the view that interest abatement under section 6404(e)(1) is a discretionary form of relief within the sole authority of the Commissioner and is thereby be-

yond the scope of judicial review."). No court had permitted a taxpayer's Section 6404(e)(1) claim to proceed.

Congress was well aware of those precedents. In describing then-present law, the House Committee on Ways and Means stated that "[f]ederal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." H.R. Rep. No. 506, at 28. Section 6404(h) resolved that problem by providing a specific mechanism to implement Congress's view that "it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers." *Ibid.* Because Section 6404(h) was enacted on the understanding that taxpayers could not previously obtain judicial review of the Secretary's determinations under Section 6404(e)(1), *North Dakota* and *Brown* support the conclusion that the limited remedy in the Tax Court is exclusive.[6]

Had Congress wanted to overturn the judicial decisions holding that the district courts could not adjudicate taxpayer challenges to Section 6404(e)(1) determinations, it could have done so in a straightforward and

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[6] Petitioners rely (Pet. Br. 32) on the Committee Report's statement that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." H.R. Rep. No. 506, at 28. That statement is of no assistance to petitioners, however, because it merely disclaimed any inference as to "present law"—*i.e.*, the state of the law *prior* to enactment of Section 6404(h)—regarding the existence *vel non* of federal court jurisdiction to review interest abatement determinations. Whatever the correct resolution of that question, Congress clearly recognized that the federal courts had consistently rejected efforts by taxpayers to obtain such review, and Congress chose to remedy that situation prospectively by expressly conferring jurisdiction on the Tax Court alone. As discussed in the text, when Congress creates a remedy in such circumstances, it is generally deemed exclusive.

direct way by expressly providing for judicial review in those courts. Instead, Congress created only a limited remedy in the Tax Court. That congressional judgment should be respected.

C. When Congress Establishes A Specific Review Procedure, That Procedure Is Generally Regarded As Exclusive

In holding that Section 6404(h) vests exclusive jurisdiction in the Tax Court, the court of appeals relied (Pet. App. 12) in part on the principle that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (citing cases). In *Whitney*, the Court explained that, in establishing a particular statutory review procedure, Congress intended to permit an agency—there, the Federal Reserve Board—to pass on matters within its area of expertise, including a bank holding company's plan to own and operate a new national bank. *Ibid.* Because "permit[ting] a district court to make the initial determination * * * would substantially decrease the effectiveness of the statutory design," *ibid.*, by, among other things, producing "conflicting determinations," *id.* at 422, the Court ruled that the special review procedure was "exclusive" despite "the absence of an express statutory command of exclusiveness," *ibid.*

The principle that a statutory review procedure is exclusive applies not only to the administrative process but also to Congress's allocation of judicial review authority. When Congress confers such authority on a particular court or courts, that conferral of jurisdiction

is properly understood to be exclusive. See, *e.g.*, *Greater Detroit Res. Recovery Auth.* v. *EPA*, 916 F.2d 317, 321 (6th Cir. 1990) ("It is a well settled principle that where Congress establishes a special statutory review procedure for administrative action, that procedure is generally the exclusive means of review for those actions."); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 475 (11th Cir. 1984) ("It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive. And this result does not depend on Congress using the word 'exclusive' in the statute providing for a forum for judicial review.") (quoting *Gardner* v. *Alabama*, 385 F.2d 804, 810 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968)). That principle is embodied in the Administrative Procedure Act, which provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703.

The rule that a special statutory review procedure is generally exclusive reinforces the conclusion that Section 6404(h) provides the sole means for a taxpayer to challenge an adverse Section 6404(e)(1) determination. Channeling initial judicial review to a single court will enhance tax administration by enabling that court to develop greater expertise and by facilitating the development of a more uniform and consistent approach to interest abatement issues. See, *e.g.*, *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("[C]ourts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise."). By contrast, permitting the district courts and the Court

of Federal Claims to make the initial determinations about errors and delays in the ministerial (and, for later years, managerial) acts of tax administration would immerse those courts in the internal procedures of the IRS and threaten to burden tax administration with divergent and conflicting decisions.[7] That result would "substantially decrease the effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420.[8]

D. The Fifth Circuit's Decision In *Beall* Is Incorrect

Neither petitioners nor the Fifth Circuit in *Beall* v. *United States*, 336 F.3d 419 (2003), have offered a sound reason to disregard the settled and complementary rules that a specific remedy precludes resort to a general one and that a special review procedure is generally re-

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[7] The problem of divergent authorities might be exacerbated by the absence of concrete statutory guidance on when interest should be abated. See, *e.g.*, *Selman* v. *United States*, 941 F.2d 1060, 1063 (10th Cir. 1991) ("Although the statute authorizes the Secretary to abate interest attributable to certain IRS errors or delays, it neither indicates that such authority should be used universally nor provides any basis for distinguishing between the instances in which abatement should and should not be granted."). Although conflicting authority may still develop among the courts of appeals, review by the numerous district courts and the Court of Federal Claims is more likely to frustrate uniformity. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (review by "thousands of federal- and state-court judges" "could only result in the sort of 'multiple interpretations'" that the law sought to avoid (citation omitted)).

[8] In *Freytag* v. *Commissioner*, 501 U.S. 868, 885-889 (1991), the Court held that, for purposes of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, the Tax Court is not a "Department" of the Executive Branch. The fact remains, however, that the Tax Court "is a specialized court with expertise in tax matters." Pet. App. 13.

garded as exclusive.[9] In holding that the Tax Court's jurisdiction was not exclusive, the Fifth Circuit reasoned that, by enacting Section 6404(h), "Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion." Pet. App. 30. But Congress expressed that intent in the context of establishing a specific, limited remedy that by its plain terms subjects the Secretary's interest abatement decision to review only by the Tax Court and at the behest of only a subset of all taxpayers.

The question is whether Congress intended for that remedy to be exclusive or instead intended to permit taxpayers, including taxpayers who are not even eligible to avail themselves of the limited remedy, to pursue refund actions under other remedial schemes. Section 6404(h) no doubt indicates "that the abatement decision is no longer committed solely to agency discretion," as the Fifth Circuit observed (Pet. App. 30), but that observation says nothing about *where* Congress intended challenges to the Secretary's exercise of discretion to be brought, nor does it specify whether Congress intended taxpayers who are ineligible to pursue the limited remedy to obtain relief by other means. If the indication that there is now law to apply had come from some distinct legislative enactment, there might be something to the Fifth Circuit's reasoning. But when the only indication that an issue is not committed to agency discretion comes in the very legislation that creates a limited forum- and plaintiff-specific remedy, the far more natural inference is that the new regime is exclusive. For all

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[9] Moreover, even if Section 6404(h) were ambiguous, under principles of sovereign immunity, any doubt about whether Section 6404(h) is an exclusive remedy must be resolved in favor of the government. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 646 (2006).

the reasons discussed above, Congress intended challenges to adverse Section 6404(e)(1) decisions to be brought exclusively in the Tax Court subject to Section 6404(h)'s express limitations.

1. The canon of implied repeal does not assist petitioners

The Fifth Circuit reasoned that it would not read the Tax Court's jurisdiction to be exclusive because "[r]epeals by implication * * * are disfavored." Pet. App. 34; see Pet. Br. 28-29. The court's reliance on that canon is fundamentally misplaced.

The implied-repeal canon presupposes that giving effect to one statute would mean denying effect to another, and rests on the common sense assumption "that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. But that assumption has no application when Congress had no reason to believe, at the time it legislated, that preexisting "language on the statute books" provided a different answer to the problem being addressed.[10] This Court's decision in *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), is instructive. There, the question presented was whether a federal tax claim would be given preference over a secured creditor's lien on real property, when the federal tax claim was not valid under the Federal Tax Lien Act of 1966. The government contended that the tax claim was valid under the more general federal priority statute, which

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[10] That principle applies with particular force here, where the statutory basis for judicial review (*i.e.*, that there now is a standard to apply to the Secretary's determination) was enacted as part of the same legislation that created a limited remedy in the Tax Court and was therefore not "on the statute books" for purposes of any implied-repeal analysis.

predated the 1966 Act. Because the "basic question" of whether the preexisting priority statute accorded the government a preference over secured creditors had never been resolved, the Court held that it was not "appropriate to view the issue in this case as whether the Tax Lien Act of 1966 has implicitly amended or repealed the priority statute." 523 U.S. at 530.

Romani's rationale for rejecting application of the implied-repeal canon applies with even greater force here. Before Section 6404(h) was enacted, all of the federal courts to have addressed the issue were in agreement that a refund action did not lie to recover unabated Section 6404(e)(1) interest, because the matter was committed to agency discretion. See, *e.g.*, *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991); see also Pet. Supp. App. 89-94 & nn.10-13. Petitioners argue (Pet. Br. 35-36) that those courts erred in applying the APA in the context of a tax refund suit.[11] The relevant point for implied-repeal analysis, however, is that when Congress created the Section 6404(h) remedy, Section 6404(e)(1) had not been authoritatively construed to create a right to obtain judicial review of an adverse interest abatement decision. To the contrary, the courts had uniformly construed Section 6404(e)(1) not to create any judicially enforceable right. In those circumstances, Congress had no reason to believe that it was eliminating any taxpayer rights when it enacted

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[11] But see Pet. Br. 36 ("The APA codified well-established common law rules of judicial preclusion, and the analysis is equally applicable to non-APA cases."). The United States believes that those decisions were correct for the reasons they provided.

Section 6404(h) to provide a remedy for certain taxpayers in the Tax Court.

When Congress believes that it is providing a remedy where none previously existed, or where any potential remedies were "problematic," this Court does not apply the implied-repeal canon; rather, it applies the rule that the remedy Congress provides is exclusive. See *North Dakota*, 461 U.S. at 285; *Brown*, 425 U.S. at 826-829; see also *Romani*, 523 U.S. at 530. Implied-repeal analysis is particularly inappropriate because the general remedy "creates no rights but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" *Abrams*, 544 U.S. at 120 n.2 (quoting *Novotny*, 442 U.S. at 376). Thus, in *Abrams* the Court held that the individually enforceable rights created by 47 U.S.C. 332(c)(7) could be enforced only through the remedy authorized by that provision, notwithstanding that those rights otherwise would have been enforceable within the remedial framework of the earlier-enacted 42 U.S.C. 1983. 544 U.S. at 127. The Court explained that "[c]onstruing § 332(c)(7), as we do, to create rights that may be enforced only through the statute's express remedy, leaves the pre-[Telecommunications Act] operation of § 1983 entirely unaffected." *Id.* at 126.

Similarly, in *Novotny*, the Court held that the deprivation of a right created by Title VII could not be the basis for a cause of action under the earlier-enacted 42 U.S.C. 1985(3), but could only be enforced through Section 717 of Title VII. 442 U.S. at 376-378. The case did not present a question of implied repeal, the Court held, because "Section 1985(3) * * * *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right * * * is breached." *Id.* at 376. Rather, the Court

applied the analysis of *Brown* to conclude that the specific remedy in Title VII foreclosed resort to the more general remedy in Section 1985(3).

Like 42 U.S.C. 1983 and 1985(3), the tax refund statutes—28 U.S.C. 1346(a)(1), 1491(a)(1), and 26 U.S.C. 7422—create no substantive rights, but merely provide a remedial framework within which taxpayers may contest the collection of amounts alleged to be excessive under the governing substantive provisions of the Tax Code. Accordingly, under *Abrams* and *Novotny*, the creation of a new remedial framework (*i.e.*, Section 6404(h)) for the enforcement of the relevant substantive right (*i.e.*, Section 6404(e)(1)) limits enforcement to the newly enacted remedial framework and does not implicate the implied-repeal canon.[12]

2. Exclusive Tax Court jurisdiction is consistent with the general structure of the Tax Code

Contrary to the view of the Fifth Circuit, exclusive Tax Court jurisdiction over Section 6404(e)(1) claims is not "inconsistent with the general structure of the Internal Revenue Code." Pet. App. 36. In general, when a

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[12] Petitioners mistakenly contend (Pet. Br. 29) that reading Section 6404(h) to vest exclusive jurisdiction in the Tax Court "repeal[s]" refund jurisdiction that previously existed. The refund provisions operate no differently after Section 6404(h)'s enactment than they did pre-enactment. Petitioners suggest that there is a difference in that the district courts and Court of Federal Claims previously had refund jurisdiction but simply determined that they could not exercise it. But for purposes of understanding the practical problem that Congress was addressing, the distinction petitioners seek to draw is not meaningful. Cf. *Community Nutrition Inst.*, 467 U.S. at 353 n.4 ("[C]ongressional preclusion of judicial review is in effect jurisdictional."). The reality was that no judicial relief was available, and Congress created a remedy in the Tax Court on that understanding.

taxpayer disputes the tax liability determined by the IRS, he may obtain a determination of that liability either by the Tax Court, see 26 U.S.C. 6213(a), or, if the taxpayer has paid the tax in full, by a federal district court or the Court of Federal Claims.[13] The Tax Court also has jurisdiction, in an increasing number of circumstances, to review administrative determinations by the IRS that do not pertain to the taxpayer's substantive tax liability.[14] The terms of Tax Court and district court (and Court of Federal Claims) jurisdiction in those cases are instructive, because they illustrate that the Tax Court has exclusive jurisdiction to review such administrative matters unless Congress expressly provides otherwise.

Section 6330(d) of the Code permits taxpayers to obtain judicial review of certain administrative determinations pertaining to the collection of taxes. As originally enacted, the statute permitted taxpayers to appeal to the Tax Court in some cases (and granted the Tax Court jurisdiction to hear those cases) and to district courts in all other cases (without a parallel grant of jurisdiction).[15] 26 U.S.C. 6330(d)(1). The Court of Federal

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[13] Full payment of the disputed amount (following the issuance of a notice of deficiency) does not, however, divest the Tax Court of jurisdiction. 26 U.S.C. 6213(b)(4); *Richter* v. *Commissioner*, 16 B.T.A. 936, 937 (1929); *De Sabichi* v. *Commissioner*, 4 B.T.A. 445, 447 (1926). In such cases the Tax Court retains authority to determine overpayments and, if necessary, to order refunds. 26 U.S.C. 6512(b).

[14] That Congress originally created the Tax Court's predecessor (the Board of Tax Appeals) as a forum for the pre-payment determination of tax liability, as petitioners point out (Pet. Br. 30-31), does not prevent Congress from assigning additional functions to the Tax Court, and Congress clearly has done so.

[15] As originally enacted, Section 6330(d)(1) (Supp. IV 1998) (App., *infra*, 4a) provided:

Claims has no jurisdiction to review collection determinations. *Ibid.*; *Fry* v. *United States*, 72 Fed. Cl. 500, 504-505 (2006). Several courts held that the Tax Court's Section 6330(d) jurisdiction, where it exists, is exclusive. *E.g.*, *Redeker-Barry* v. *United States*, 476 F.3d 1189, 1191 (11th Cir. 2007) (per curiam); *Voelker* v. *Nolen*, 365 F.3d 580, 581 (7th Cir. 2004); *Marino* v. *Brown*, 357 F.3d 143, 146 (1st Cir. 2004). Congress recently revised Section 6330(d) to give the Tax Court exclusive jurisdiction in all cases arising under Section 6330. Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 1019; see App., *infra*, 5a.

The Tax Court also has jurisdiction to review the IRS's administrative determinations regarding innocent spouse relief under 26 U.S.C. 6015(e). Unlike Sections 6330(d) and 6404(e)(1), however, Section 6015(e)(1)(A) specifies that Tax Court jurisdiction exists "[i]n addition to any other remedy provided by law." 26 U.S.C. 6015(e)(1)(A) (App., *infra*, 1a-2a). Section 6015(e) also sets out a procedure under which, if a refund suit regarding the same liability is filed in a district court (or the Court of Federal Claims), jurisdiction to review the administrative determination regarding innocent spouse relief will be transferred from the Tax Court to the dis-

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(d) Proceeding After Hearing.—

(1) JUDICIAL REVIEW OF DETERMINATION.—The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

trict court (or the Court of Federal Claims). 26 U.S.C. 6015(e)(3) (App., *infra*, 3a).

Tax Court jurisdiction under Section 6404(h), like Tax Court jurisdiction under Sections 6330(d) and 6015(e), entails review of an administrative determination. In each case, the administrative determination pertains not to the proper determination of the taxpayer's substantive tax liability under the Internal Revenue Code, but rather to the incidents of tax administration. There is no reason for the scheme of Tax Court review of such administrative determinations to match the scheme applicable to determinations of substantive tax liability.[16] To the contrary, examination of Sections 6015(e), 6330(d), and 6404(h) indicates that Tax Court jurisdiction is exclusive in such cases unless the statute expressly provides otherwise.

3. Exclusive review in the Tax Court does not create any anomalies, let alone anomalies that would justify departing from Section 6404(h)'s text

The Fifth Circuit further reasoned that exclusive Tax Court review would create "anomalies." As the court below correctly concluded (Pet. App. 16), however, the "anomalies" identified by the Fifth Circuit do not justify departure from "a statute that is clear on its face."

a. The first of those—that wealthy taxpayers will be without recourse to judicial review—is no anomaly at all:

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[16] For this reason, petitioners err in relying (Pet. Br. 24) upon statutes that extend the Tax Court's jurisdiction in those cases where it already has jurisdiction to make a de novo determination of tax liability. The extensions of Tax Court jurisdiction under Sections 6621(c) and 7481(d), for example, both depend upon the existence of such de novo review jurisdiction. See 26 U.S.C. 6621(c)(4) (1988) (repealed 1989), 7481(d).

as noted in Part B(1)(b) above, Congress intended to fashion relief only for taxpayers of relatively limited financial means. See H.R. Rep. No. 506, at 28 ("[I]t is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to *certain taxpayers.*") (emphasis added).

Petitioners now assert (Pet. Br. 44-48) that the net-worth limitation would violate the due process rights of many taxpayers. Petitioners concede (*id.* at 44), however, that there is no evidence in the record that their net worth exceeds the statutory limit, and accordingly they lack standing to bring a facial constitutional challenge. See *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). A facial challenge is strongly disfavored in any event. See, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'") (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

Moreover, the notion that there is a due process entitlement to obtain judicial review of adverse Section 6404(e)(1) decisions lacks merit. See *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts * * * is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning *violations of fundamental constitutional rights.*") (emphasis added). Prior to the 1996 amendments, no taxpayer could obtain review of agency interest-abatement determinations in any court, and

there is no plausible basis for suggesting that the absence of such review was constitutionally problematic.

The Fifth Amendment's Due Process Clause has been construed to contain an equal protection component, but any claim that the net-worth limitation violates equal protection would similarly lack merit. See *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 24, 44 (1973) (observing that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages" and applying rational-basis review). There is plainly a rational basis for the net-worth limitation in Section 6404(h). As the court of appeals pointed out (Pet. App. 16), that wealth limitation is also found in Section 7430 and is ultimately derived from the more generally applicable Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(2)(B) (1986). See *Richard* v. *Hinson*, 70 F.3d 415 (5th Cir. 1995) (upholding EAJA net-worth provision against equal protection challenge), cert. denied, 518 U.S. 1004 (1996). And, as explained above, see Part B(1)(b), *supra*, taxpayers with a high net worth are financially better positioned to make an advance payment or deposit to stop the accrual of interest in the first place. See *Kunze*, 233 F.3d at 954-955. Petitioners concede (Pet. Br. 46) that it would be reasonable for Congress to demand that high net-worth taxpayers make an advance payment before initiating a refund suit. It is equally reasonable to expect such taxpayers to make payments before interest accrues in the first place.

Petitioners attempt to bolster their due process argument by suggesting (Pet. Br. 45-46) that Tax Court jurisdiction in Section 6404(h) cases is also restricted by the "prevailing party" rules of 28 U.S.C. 2412(d)(1)(B)

(1986).[17] Petitioners assert (Pet. Br. 45) that they would have been barred from the Tax Court under that restriction. But 28 U.S.C. 2412(d)(1)(B) (1986) does not operate as such a bar. To be sure, Section 6404(h)(1) references "the requirements referred to in section 7430(c)(4)(A)(ii)," and that provision, in turn, refers to two sets of requirements: the net-worth requirements set forth in 28 U.S.C. 2412(d)(2)(B) (1986), as discussed above, and "the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court." 26 U.S.C. 7430(c)(4)(A)(ii). The first sentence of Section 2412(d)(1)(B) provides that:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. 2412(d)(1)(B) (1986). Petitioners here are not "[a] party seeking an award of fees and other expenses," and there was no preexisting "action" and thus no "final

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[17] Petitioners' assertion (Pet. Br. 45) that the court of appeals "ignor[ed]" this problem is incorrect. Petitioners did not raise this argument in that court, while the government pointed out (albeit in passing) that "Congress meant to refer only to the net worth requirements of Section 7430." Gov't C.A. Br. 37-38 (citing H.R. Rep. No. 506, at 28).

judgment" or "prevailing party." See Pet. Br. 45. From those facts, petitioners conclude that they could not qualify for Tax Court jurisdiction under 26 U.S.C. 6404(h) (Supp. IV 2004) (and indeed that "very few taxpayers will ever [so] qualify"). Pet. Br. 45.

Petitioners are plainly mistaken. By its express terms, the requirements imposed by the first sentence of 28 U.S.C. 2412(d)(1)(B) apply only to parties "seeking an award of fees and other expenses," and thus have no relevance or application to litigants like petitioners who are instead seeking an abatement of interest under Section 6404. Petitioners' strained reading is contrary to the text of the statute and would lead to nonsensical results. It should be rejected.[18]

b. The second "anomaly" identified by the Fifth Circuit is that a taxpayer may have to bring an interest abatement claim and a substantive refund claim in separate fora.[19] As discussed above, an interest abatement claim under Section 6404(e)(1) is based on the incidents of tax administration, not the determination of substantive tax liability under the Internal Revenue Code. Be-

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[18] While the legislative history is clear with respect to the net-worth limitation, it (not surprisingly) gives no indication that Congress intended to restrict Tax Court jurisdiction to "prevailing parties" seeking fees and costs within thirty days after "final judgment." See H.R. Rep. No. 506, at 28 ("An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees."). The United States is not aware of any case in which the Tax Court has dismissed a Section 6404(h) case for failure to meet the "prevailing party" requirement set forth in Section 7430(c)(4)(A)(ii). Cf. *Fisher* v. *Commissioner*, 80 T.C.M. (CCH) 338 (Sept. 5, 2000) (denying attorney's fees because taxpayers did not qualify as "prevailing parties" but denying interest abatement claims only as "premature").

[19] Petitioners concede (Pet. Br. 49) that this issue does not arise in their case because they have no remaining substantive refund claims.

cause such a claim raises issues entirely distinct from the taxpayer's substantive liability, implicates a different standard of review, and requires an evaluation of the internal processes of the IRS, there is nothing anomalous about channeling initial review of such claims to the Tax Court. Moreover, the vast majority of taxpayers raise their substantive claims in the Tax Court rather than the district courts or the Court of Federal Claims. See Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional*, 5 Fla. Tax Rev. 357, 412 (2001) ("[T]he Tax Court hears about 95% of litigated federal tax cases."). Those taxpayers must split their deficiency and interest abatement claims in any event, because the interest abatement claim does not become ripe until an assessment is made, which generally cannot occur until completion of the Tax Court deficiency proceedings. See 26 U.S.C. 6213(a), 6215(a); 26 U.S.C. 6404(e)(1) ("the Secretary may abate the *assessment* of all or any part of such interest") (emphasis added); *508 Clinton St. Corp.* v. *Commissioner*, 89 T.C. 352, 356 (1987) ("[S]ection 6404(e) cannot operate until our decision with respect to petitioner's underlying deficiencies becomes final, after which [the IRS] may assess such deficiencies, including the interest attributable thereto.").

Petitioners err in suggesting (Pet. Br. 48-49) that construing Section 6404(h) as exclusive would require the splitting of a single claim, with preclusive effects on the second litigation. Because a taxpayer cannot bring an interest abatement claim in a refund suit in district court or the Court of Federal Claims, claim preclusion

could not apply.[20] See, *e.g.*, Restatement (Second) of Judgments § 26(1)(c) (1982).

E. This Court Presumes That An Agency Will Act In Good Faith

Finally, petitioners argue (Pet. Br. 50) that if the Tax Court has exclusive jurisdiction over claims under Section 6404(e)(1), the result would be to leave them "at the mercy of the IRS," which, they argue, might simply fail to process the administrative claim for abatement. That hypothetical possibility however, is created only by Congress's decision to condition the availability and timing of review under Section 6404(h)(1) on the Secretary's final determination not to abate interest. In choosing that language, Congress evidently legislated against a background assumption that the agency would not withhold action in bad faith. This Court likewise routinely presumes that an agency will carry out its responsibilities in good faith. See, *e.g.*, *USPS* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). There is no basis for deviating from that background assumption here. The IRS acted upon (and denied) petitioners' Section 6404(e)(1) claim, see Pet. Br. 6, and they offer no basis for concluding that the IRS is frustrating Section

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[20] Of course, if a taxpayer's substantive refund claims succeeded, the interest would abate automatically (and, indeed, the government might well owe the taxpayer interest on the overpayment), thus mooting any separate claim for interest abatement. The opposite, however, is not true: if the government prevailed in the substantive refund case, the interest abatement claim might still proceed. And should the interest abatement claim be resolved first, the outcome would have no impact on the taxpayer's substantive liability.

6404(h)'s exclusive review scheme.[21] In any event, if problems ever arose, it would be the province of Congress to address them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[21] The taxpayers in *Beall* did file their action in district court before the IRS acted on their administrative claim, but they brought suit less than one year after submitting that claim. Pet. App. 19. In *Bourekis* v. *Commissioner*, 110 T.C. 20, 26 (1998), relied upon by petitioners (Pet. Br. 50), the IRS did not deny a request for interest abatement for the simple reason that the taxpayer never made an administrative request for such relief.

STATUTORY APPENDIX

1. Section 6015(e)(1) of Title 26, United States Code, as amended by Tax Relief and Healthcare Act of 2006, Pub. L. No. 109-432, Div. C, Tit. IV, 408(a),(b), 120 Stat. 3061-3062 provides:

(e) Petition for review by Tax Court

(1) In general

In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)—

(A) In general

In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed—

(i) at any time after the earlier of—

(I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or

(II) the date which is 6 months after the date such election is filed or request is made with the Secretary, and

(ii) not later than the close of the 90th day after the date described in clause (i)(I).

(B) Restrictions applicable to collection of assessment

(i) In general

Except as otherwise provided in section 6851 or 6861, no levy or proceeding in court shall be made, begun, or prosecuted against the individual making an election under subsection (b) or (c) or requesting equitable relief under subsection (f) for collection of any assessment to which such election or request relates until the close of the 90th day referred to in subparagraph (A)(ii), or, if a petition has been filed with the Tax Court under subparagraph (A), until the decision of the Tax Court has become final. Rules similar to the rules of section 7485 shall apply with respect to the collection of such assessment.

(ii) Authority to enjoin collection actions

Notwithstanding the provisions of section 7421(a), the beginning of such levy or proceeding during the time the prohibition under clause (i) is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this subparagraph to enjoin any action or proceeding unless a timely petition has been filed under subparagraph (A) and then only in respect of the amount of the assessment to which the election under subsection (b) or (c) relates or to which the request under subsection (f) relates.

2. Section 6015(e)(3) of Title 26, United States Code, provides:

* * * * *

(3) Limitation on Tax Court jurisdiction. If a suit for refund is begun by either individual filing the joint return pursuant to section 6532—

(A) the Tax Court shall lose jurisdiction of the individual's action under this section to whatever extent jurisdiction is acquired by the district court or the United States Court of Federal Claims over the taxable years that are the subject of the suit for refund, and

(B) the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection.

3. Section 6213(a) of Title 26, United States Code, provides:

Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the

expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

4. Section 6330(d)(1) (Supp. IV 1998) of Title 26, United States Code, provided:

Notice and opportunity for hearing before levy

* * * * *

(d) Proceeding after hearing

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

* * * * *

5. Section 6330(d)(1) of Title 26, United States Code, as amended by Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 1019 provides:

Notice and opportunity for hearing before levy

* * * * *

(d) Proceeding after hearing.—

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

* * * * *

6. Section 6404(e)(1)(1994) of Title 26, United States Code, provides:

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service.

(1) In general

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

7. Section 6404(e)(1)(Supp. II 1996) of Title 26, United States Code, provides:

* * * * *

Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service

(1) In general

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

* * * * *

8. Section 6404(h)(Supp. IV 2004) of Title 26, United States Code, provides:

* * * * *

Review of denial of request for abatement of interest

(1) In general

The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

(2) Special rules

(A) Date of mailing

Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

(B) Relief

Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

(C) Review

An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

* * * * *

9. Section 6512(b) of Title 26, United States Code, provides:

* * * * *

Limitations in case of petition to Tax Court

(b) Overpayment determined by Tax Court

(1) Jurisdiction to determine

Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year, or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to

any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction to enforce

If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit on amount of credit or refund

No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511 (b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511 (b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency—

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

In the case of a credit or refund relating to an affected item (within the meaning of section 6231 (a)(5)), the preceding sentence shall be applied by substituting the periods under sections 6229 and 6230(d) for the periods under section 6511(b)(2), (c), and (d).

In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.

(4) Denial of jurisdiction regarding certain credits and reductions.

The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

* * * * *

10. Section 6532(a)(1)-(2) of Title 26, United States Code, provides:

Periods of-limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of Time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpaper and the Secretary.

* * * * *

11. Section 7422 of Title 26, United States Code, provides:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

12. Section 7430(c)(4)(A) of Title 26, United States Code, provides:

* * * * *

Awarding of costs and certain fees

(4) Prevailing party

(A) In general

The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)—

(i) which—

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

* * * * *

13. Section 1346 of Title 28, United States Code, provides:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

14. Section 1491(a)(1) of Title 28, United States Code, provides in pertinent part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express implied contract with the United States.

15. Section 2412(d)(1)(B)(Supp. IV 1986) of Title 28, United States Code, provides in pertinent part:

Costs and fees

(d)(1)

* * * * *

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party

stating the actual time expended and the rate at which fees and other expenses were computed.

* * * * *

16. Section 2412(d)(2)(B)(Supp. IV 1986) of Title 26, United States Code, provides:

(d)(2)

* * * * *

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

* * * * *